TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 452.

JOHN BAILEY, APPELLANT,

vs.

THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.

FILED DECEMBER 1, 1871.

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INDEX

	Original.	Print.
Bill of complaint	1	1
Exhibit "A" referred to in bill of complaint	10	5
"B" referred to in bill of complaint	22	11
"C" referred to in bill of complaint	23	11
Order for subpœna	24	12
Subpœna	24	12
Return: Acknowledgment of service	25	13
Preliminary injunction	26	13
Order requiring bond of complainant	26	13
Bond of complainant filed	27	13
Bond	27	14
Appearance of defendant	28	14
Defendant's answer filed	28	15
Defendant's answer	29	15
Exhibit "A" of defendant's answer	33	17
"B" of defendant's answer	37	20
"C" of defendant's answer	38	20
Certificate to Defendant's Exhibits "A," "B," and "C"	39	21
Amended answer filed	41	22
Amended answer. Consent to file	41	22
Amended answer	41	22
Exhibit "A" of defendant's amended answer	48	26
"B" of defendant's amended answer	48	26
"C" of defendant's amended answer	52	27
"D" of defendant's amended answer	52	28
"E" of defendant's amended answer	52	28
"F" of defendant's amended answer	54	29
"G" of defendant's amended answer	56	30

	Original.	Print.
Stipulation filed	56	30
Stipulation	56	30
Hearing of cause	57	31
Replication filed, (nunc pro tunc)	58	31
Replication	58	31
Final decree	59	32
Appeal allowed and transcript ordered	59	32
Agreement of counsel	60	33
Appeal bond	60	33

EVIDENCE FOR COMPLAINANT READ UPON THE HEARING OF THE CAUSE.

Deposition of Edward T. Hornblower	61	34
Exhibit "A^1" annexed to E. T. Hornblower's deposition	65	36
"A^2" annexed to E. T. Hornblower's deposition	65	36
"A^3" annexed to E. T. Hornblower's deposition	65	36
"A^4" annexed to E. T. Hornblower's deposition	66	36
Deposition of Thomas L. Taylor	67	37
Deposition of Nathaniel Thayer	68	37
Exhibit "A, C. F. W." annexed to N. Thayer's deposition for complainant	75	42
"B, C. F. W." annexed to N. Thayer's deposition for complainant	76	43
"C, C. F. W." annexed to N. Thayer's deposition for complainant	76	43

EVIDENCE FOR DEFENDANT READ UPON THE HEARING OF THE CAUSE.

Deposition of John L. Lathrop	77	43
Nathaniel Thayer	80	45
Jno. W. Brooks	85	48
H. H. Hunnewell	88	49
W'm Boolt	90	51
Deposition of Sidney Bartlett	92	52
Deposition of H. P. Kidder	94	53
Supplemental deposition of Jno. W. Brooks	96	54
Agreement in relation to same	97	54
Exhibit "B" annexed to deposition of N. Thayer and others	98	55
"C" annexed to deposition of N. Thayer and others	98	55
"D" annexed to deposition of N. Thayer and others	98	55
"E" annexed to deposition of N. Thayer and others	98	55
"F" annexed to deposition of N. Thayer and others	99	56
"G" annexed to deposition of N. Thayer and others	99	56
"H" annexed to deposition of N. Thayer and others	100	56
"I" annexed to deposition of N. Thayer and others	100	56
"K" annexed to deposition of N. Thayer and others	100	56
Clerk's certificate to transcript	102	57
Agreement of counsel	103	57

1 MISSOURI DISTRICTS, *sct:*

Pleas before the honorable circuit court of the United States for the districts of Missouri, at the April term thereof, A. D. 1871.

JOHN BAILEY, COMPLAINANT,
vs.
THE HANNIBAL AND ST. JOSEPH RAILROAD Company, defendants. } In chancery.

Be it remembered that, heretofore, to wit, on the seventeenth day of November, A. D. 1870, there was filed in the clerk's office of the circuit court of the United States for the districts of Missouri, the following bill in equity in the above-entitled cause, to wit:

In the circuit court of the United States for the districts of Missouri, ss.

JOHN BAILEY, COMPLAINANT,
vs.
THE HANNIBAL AND ST. JOSEPH RAILROAD Company, defendants.

Bill of complaint.

To the judges of the circuit court of the United States, for the districts of Missouri.

John Bailey, of the town of Hackensack in, and a citizen of, the State of New Jersey, brings this his bill against the Hannibal and St. Joseph Railroad Company, a citizen of the State of Missouri, and thereupon your complainant alleges as follows:

2 Firstly. That the Hannibal and St. Joseph Railroad Company, the defendants, are a corporation duly chartered by and under the laws of the State of Missouri, and pursuant to an act of the legislature of said State, passed and approved February 16, 1847, entitled an act to incorporate the Hannibal and St. Joseph Railroad Company, and other acts amendatory thereof.

Secondly. That said defendants, after their incorporation and prior to April 1st, 1863, issued and delivered their certain certificates of stock, hereinafter mentioned as common or unpreferred stock, divided into shares of one hundred dollars each, and amounting in the aggregate at par to about three millions of dollars. That said defendants, after their said incorporation and prior to April 1st, 1863, constructed the railroad authorized by their charter, and situated in said State of Missouri, became possessed of the lands, franchises, rolling-stock, and other property in Exhibit "A," hereto annexed, mentioned, and were, on said April 1st, 1863, in possession thereof, subject to the liens of the State of Missouri, and of the three several mortgages in Exhibit "A," hereto annexed, described, and were, on said April 1st, operating said railroad and have ever since continued to operate the same.

Thirdly. That, prior to said April 1st, 1863, said defendants also duly executed, issued, and delivered, for a valuable consideration therefor received, to various persons and corporations, their certain bonds, of the respective dates, of the amounts, drawing the interest, payable at the times and in the manner, and secured by the mortgages, also duly exe-

cuted and delivered by said defendants to the persons, for the benefit of the bondholders, upon the property, embracing the terms and
3 of the tenor described in said Exhibit A, which said exhibit is hereby made a part hereof. That said several bonds were, on said April 1st, 1863, held by various persons and corporations, and were valid subsisting obligations of said defendants; and that the payment thereof was secured upon the property of said defendants of great value, and by the said mortgages held by the persons therein mentioned for the benefit of the holders of said bonds.

Fourthly. That said defendants were, on said April 1st, 1863, unable to pay and did not pay regularly or otherwise the interest due on said bonds, and were wholly unable to pay and did not pay any dividends whatsoever upon any part of said stock; and that said stock was at said time without any pecuniary value. That said road, lands, franchises, rolling-stock, and other property of the defendants were at said time exposed and liable to be sold by and under foreclosures of said mortgages or of some of them, and the proceeds thereof applied upon and in payment of said bonds, and said unpreferred stock left wholly worthless and extinguished; and that if said foreclosure had then been made, the entire property and franchises of said corporation would not have produced more than sufficient to have paid said bonds so secured by said mortgages.

Fifthly. That, on said April 1st, 1863, said corporation, the defendants, duly executed and delivered to the persons therein mentioned as trustees the indenture hereinbefore mentioned, being "Exhibit A," a copy whereof is hereunto annexed. That as this complainant is informed, believes, and alleges, the terms of said indenture were accepted by the holders of said respective bonds in the manner and time prescribed thereby,
4 and that preferred stock as in said Exhibit A, described, was issued to and taken by the holders of said bonds, and certificates of said preferred stock were by said defendants issued to the several bondholders thereof, a copy of which certificates is hereunto annexed, forms a part hereof, and is marked "Exhibit B." That, by the surrender of said bonds issued prior to April 1st, 1863, and the acceptance of the bonds and preferred stock in lieu thereof, in Exhibit A set forth, the holders of the bonds of defendants, issued April 1st, 1856, surrendered and lost the security by mortgage of thirty per cent. of their bonds last mentioned, and of six months' interest thereon, accruing between April 1st, 1863, and April 1st, 1864; the holders of said bonds of defendants, issued July 1st, 1858, lost and surrendered the security by mortgage of forty per cent. of said bonds and of six months' interest thereon, accruing between July 1st, 1863, and July 1st, 1864; and the holders of said defendants' bonds, issued Nov. 1st, 1859, surrendered and lost the security by mortgage of all the bonds and obligations of the defendants; and that all of said three classes of holders by the surrender of said bonds gave up and lost bonds or obligations of said defendants secured by mortgages on very valuable property, lands, road, rolling-stock, and other effects amounting to three millions six hundred thousand dollars, surrendering and relinquishing the evidences of the debt and the security therefor, so that if said company continued after April 1st, 1863, as they then were as to pecuniary means, said holders would absolutely lose, or run great and probable risks of losing said three millions six hundred thousand dollars; that said bonds so surrendered with the unpaid coupons thereon, and
5 the mortgages securing the same authorized to be cancelled, were so surrendered and authorized to be cancelled, and said losses were agreed to be incurred by the holders of said bonds upon the faith

and confidence that said defendants would faithfully and fairly carry out the provisions in said indenture, Exhibit A, contained in their favor; and that successive holders of the preferred stocks issued in pursuance of said indenture, took the same, and that this complainant took the preferred stock now held by him hereinafter mentioned, upon the faith that the rights and benefits secured to said stock under and by said indenture would be faithfully and truly yielded thereto, and that the dividends due by said indenture and in consideration of the losses and risks incurred as aforesaid, and by and under the terms of said certificates of preferred stock would be paid to said holders and to this complainant.

And this complainant alleges that, by and under said indenture, the holders of said preferred stock and their assigns became and are entitled, and that this complainant, as owner of eight hundred shares of said preferred stock, is entitled to have and receive from the net earnings of said road in each year, whenever a dividend of said earnings shall be made, before any dividend shall be made to or upon said unpreferred stock, a dividend of seven per cent. per share; and also, in addition thereto, and beyond said seven per cent., a further dividend, together with said common stock, and of any surplus of said net earnings which shall be equal to the dividend declared as paid to the said unpreferred stocks; or, in other words, of a dividend of seven per cent. per share, if said net earnings are sufficient therefor, and, if more than sufficient,

6 then to share in any surplus beyond said seven per cent., equally with, and to receive the same dividend as divided upon the common or unpreferred stock.

Sixthly. That, subsequently to said April 1st, 1863, an act of the legislature of the State of Missouri was passed and approved January 21, 1864, entitled "An act authorizing the Hannibal and St. Joseph Railroad Company to convert its bonds into preferred stock, a copy whereof is hereto annexed, and forms a part hereof, marked "Exhibit C." And this complainant is advised by persons learned in the law, and believes and charges, that said act expressly empowers the said corporation to carry out the provisions of the indenture before mentioned, as contained in Exhibit A, & authorizes the issue of the preferred stock to said bondholders in conformity with the terms thereof.

Seventhly. That this complainant, prior to the declaration of a dividend in this year as in the eight' clause of this bill of complaint mentioned, was, and has ever since continued to be, and now is, the owner and holder of six hundred shares of the preferred stock of the defendants, and has, since said declaration, become, & now is, the owner of two hundred additional shares of preferred stock, all of which were issued under and in fulfillment of the terms of Exhibit A, and of the form and the terms set forth in Exhibit B, and is entitled to all the dividends covenanted and agreed by said defendants, in said indenture and by said certificate, to be paid to the owner or owners of said preferred stock out of and in the net earnings of said road.

Eight'ly. That, from April 1st, 1863, up to the declaration of the dividend as next hereafter mentioned, that holders of said preferred stock have not, as this complainant is informed, believes, and charges, and this complainant has not, received any dividends upon any of

7 said stock; that, some time in the spring or summer of the present year, 1870, and as this complainant is informed, believes, and avers, on or about June 29, 1870, said defendants declared and subsequently paid a dividend out of the net earnings of said road of seven per cent. per share to and upon the preferred stock, which dividend this complainant has received from said defendants upon his said eight hun-

dred shares; that, at the time of said declaration, as this complainant is informed, believes, and alleges, the said defendants had on hand net earnings of said road not only sufficient to pay said seven per cent. upon all said preferred stock, but also sufficient to make a further dividend upon said preferred and upon said unpreferred or common stock; that said defendants, instead of declaring or making a dividend of said surplus net earnings equally, as required by said Exhibit A and said certificates, between said preferred and said unpreferred stock, declared a dividend of three and one half per cent. therefrom to and upon said unpreferred or common stock, payable August 15th, 1870; and, as this *defendant* is informed and believes, have paid out the said dividend to and upon said unpreferred stock; that this complainant has not received, and he alle*d*ges, on information and belief, that the holders of the rest of the preferred stock have not received any part of said surplus earnings; that, as this complainant is also informed, believes, and alle*d*ges, said defendants had also on hand, on said June 29, 1870, a further surplus of net earnings sufficient to pay not only said seven *seven* per cent. on said preferred, and also mon*i*es so illegally declared as a dividend of 3½ per cent. on said unpreferred stock, but also a further surplus which said
8 defendants have not divided upon a dividend, as declared upon said preferred stock or any part thereof, but which they give out that they intend to pay and threaten to pay as a further dividend upon said unpreferred stock; that said defendants also, on or about said June 29, 1870, voted and declared that the earnings of said road from July 1st, 1870, to January 1st, 1871, be first applied to pay a further dividend of 3½ per cent. on said common or unpreferred stock; that neither the said corporation, at the time of declaring said dividend of 3½ per cent. to the holders of said common stock, made payable August 15th, 1870, declared any dividend other than said seven per cent. to any of the holders of said preferred stock, nor have they then or since declared any other dividend than said seven per cent. to said holders of said preferred stock, but aver and maintain that no other dividend than said seven per cent. is payable to the said holders of said preferred stock during any one year, and in furtherance of that view and intention, passed the resolution, and declared the dividends upon said common stock before mentioned. And this complainant alleges that said declaration of dividend to and upon said common stock, and the exclusion of said preferred stock and said stock of this complainant from an equal share therein, and said appropriation of said surplus net earnings to and upon said unpreferred or common stock are, and each of them is, a violation of said agreement (Exhibit A) and the terms of said certificates held by this complainant, have wrought a manifest injury to this complainant, and that if said declaration of intention to pay out said last-named three & one-half per cent. as a dividend to and upon said unpreferred stock be carried out that still further mischief and injury will be suffered by this complainant. And
9 this complainant specifically alle*d*ges and claims that, by and under said agreement and by and under the terms of said certificates, he was entitled to have and receive out of said net earnings, on hand June 29th, 1870, as a dividend upon his said preferred shares, beyond said seven per cent., a further dividend which should be equal to any dividend made upon said unpreferred stock; or, in other words, that, in addition to said seven per cent., he was entitled to receive, under said agreement, (Exhibit A,) and said terms of said certificates, (Exhibit B,) the same dividend as that declared or made to and upon said common stock. That this complainant is wholly remidiless in the

premises according to the modes of relief in the courts of common law, and has no plain, adequate, and sufficiemt remedy therein, and can have no sufficient relief except in a court of equity. This complainant prays that a writ of subpœna may issue out of this honorable court directed to said defendants requiring them, on a day therein named, to appear in answer to the premises; and, also, that a preliminary writ of injunction may issue out of this honorable court directed to said defendants, enjoining and restraining them, all and singular, their officers, directors, agents, and servants from making or paying out any other or further dividend upon said common or unpreferred stock, or any part thereof, until said defendants shall have first made a dividend of three & one-half per cent. upon said preferred stock of this complainant, being a dividend equal to that made, on or about June 29, 1870, to and unpreferred or common stock, and payable August 15th, 1870; and that said defendants, their and each of their officers, directors, agents, and servants be further enjoined and restained from hereafter making or paying out any dividend upon
10 the common or unpreferred stock of said defendants, unless and without they, the said defendants, after having first made said seven per cent. dividend upon said preferred stock, shall, at the same time of declaring a dividend upon the common or unpreferred stock, declare an equal dividend upon the preferred stock. And further, that, upon the final hearing of this cause, said injunction heretofore prayed for be made perpetual and for such other and further relief as justice may require.

GLOVER & SHEPLEY,
Solicitors of Complainants.

UNITED STATES OF AMERICA,
Districts of Missouri, ss:

John Bailey, complainant, being duly sworn, on his oath states that the foregoing bill of complaint & the matters & things as therein stated, so far as the same are stated as of his own knowledge, are true, and so far as stated upon information and belief, he believes them to be true.

JOHN BAILEY.

Sworn to & subscribed bofore me this 4th day of November, 1870.
LUCIEN EATON,
United States Commissioner, Mo. Dis'ts.

Exhibit A annexed to bill of complaint.

"Exhibit A," referred to in the foregoing bill of complaint, is in the words and figures following, to wit:

This indenture, made and executed this first day of April, in the year of our Lord eighteen hundred and sixty-three, by and between the Hannibal and St. Joseph Railroad Company, a corporation created by an act of the legislature of the State of Missouri, of the
11 first part, and W'm H. Swift, of the city of New York, Sidney Bartlett, and Nathaniel Thayer, of Boston, in the State of Massachusetts, trustees of the various parties who now hold the bonds of the party of the first part, bearing date, respectively, the first day of April, in the year of our Lord one thousand eight hundred and fifty-six, the first day of July, A. D. 1858, and the fifteenth day of Novem-

ber, A. D. 1859, secured by several mortgages of said corporation, and who may place said bonds in trust (or hold the bonds issued therefor) in the manner hereinafter provided, of the second part, witnesseth:

That said party of the first part did, on said first day of April, in the year of our Lord one thousand eight hundred and fifty-six, issue its bonds of that date, to the amount of five of millions of dollars, payable on the first day of April, in the year of our Lord one thousand eight hundred and eighty-one, with interest, semi-annually, at the rate of seven per cent., and did secure the payment of said bonds and interest by a mortgage upon its lands in the State of Missouri to the said Swift, Bartlett, and John Elliot Thayer, late of said Boston, deceased, as trustees, and that the said Nathaniel Thayer has succeeded the said John Elliot Thayer in said trust. The said party of the first part did, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-eight, issue its bonds of that date to the amount of one million five hundred thousand dollars, payable on the first day of July, A. D. 1883, with interest semi-annually at the rate of seven per cent., and did secure the payment of said last-named bonds, together with said bonds bearing date the first day of April, A. D. 1856, by a mortgage of its road, franchise, rolling-stock, and other property to Hollis H. Hunnewell, the said Bartlett, and Henry P. Kidder,
12 bearing date the said first day of July, A. D. 1858, subject to a lien thereon to the said State of Missouri, and did also secure the said last-named bonds by including the same in said mortgage to the same trustees of its lands, subject to said mortgage so given to secure said first-named bonds. That said corporation did, further, on the fifteenth day of November, A. D. 1859, issue its bonds of that date to the amount of one million five hundred thousand dollars, payable on the fifteenth day of November, A. D. 1889, with interest semi-annually at the rate of seven per cent., and did secure the payment of said bonds and interest by a mortgage of the same date of its said road and franchise, rolling-stock and property, bearing date the said fifteenth day of November, A. D. 1859, to the said Hunnewell, Bartlett, and Nathaniel Thayer, subject to said lien of the State of Missouri and to said mortgage hereinbefore referred to. That said corporation has found itself, from various causes, unable to pay regularly the interest upon its said bonds, as the same became due, and thereupon, in consideration of the mutual covenants by each party to be performed, it has been agreed by and between said corporation and the holders of said bonds, who shall assent to the arrangement and trust hereinafter set forth by a surrender and placing in trust of their bonds in the manner hereinafter provided, as follows, namely:

First. That each of the parties holding said bonds and the coupons belonging thereto, as to any of said bonds, shall surrender to and place in the hands of said parties of the second part, or their successors, their said bonds and unpaid coupons, to be held in trust in the manner and for the purpose hereinafter set forth.

13 Second. That each of said parties, holders of said bonds bearing date the first day of April, A. D. 1856, shall, upon so placing the same in trust, receive from said corporation new bonds of said corporation, bearing even date herewith, (and subject to this indenture,) for seventy per cent. of the principal sum named in said existing bonds, payable on the first day of April, in the year of our Lord one thousand eight hundred and eighty-one, without interest until the first day of April, one thousand eight hundred and sixty-four, but with interest-warrants or coupons for six months' interest attached thereto, payable on

said first day of April, and on the first day of April and October in each year thereafter, at the rate of seven per centum per annum, until the maturity of said bonds. And each of said parties so placing their bonds bearing date the said first day of April, A. D. 1856, in trust, and his assigns shall also, so soon as the necessary power can be obtained from the legislature of Missouri, authorizing the issue of preferred stock of the description hereinafter set forth, be, and be deemed, without any further certificate or act whatever, (subject to the conditions of this indenture,) a preferred holder of the stock of said corporation of the number of shares which, at one hundred dollars for each share, shall be equal to thirty per cent. of the principal sum named in the bonds so surrendered, together with the whole of the sums payable on the coupons attached thereto, or which may belong to any other of said bonds, up to and including the coupons falling due on the first day of October, in the year of our Lord eighteen hundred and sixty-three; and a further sum equal to twenty per cent. upon both said last-mentioned sums, which numbers of shares thus ascertained shall be adjusted and be
14 set forth in an obligation, certificate, or contract, as hereinafter provided. And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of seven per cent. from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares in the net earnings of said corporation beyond said seven per cent., but shall at no time be entitled to an accumulated dividend (in case a dividend shall fail to be made in any one or more years, or, if made, be insufficient to pay said seven per cent.) in any subsequent division of said net earnings, but shall be entitled only in that event to said seven per cent. and to share in the surplus earnings as aforesaid. And further, said corporation covenants and agrees that dividends of said earnings shall be made at least annually, if the profits of the corporation will permit, after applying such sums as shall be found proper to maintain the road and provide for working the same to the best advantage. And, further, that upon the placing of said bonds, bearing date the said first day of April, A. D. 1856, and coupons in trust, and the adjustment thereof, as aforesaid, it will issue to the party thus surrendering its certificate or obligation, declaring the number of shares of preferred stock to which said party is entitled as aforesaid, and that said shares have the rights attached thereto provided by this indenture; which certificate or obligation shall be held and be transferrable in the same manner as the existing shares in said corporation are held and transferred; and the transfers thereof shall be recorded in a book to be kept by the corporation for that purpose; and new obligations, certificates, or contracts of like tenor be issued to parties to whom
15 such transfer may be made, and until such authority shall be obtained, said corporation will pay to the holders of such obligations the sums that will be equal to the dividend thereby secured, in case any dividends shall be made by said corporation; and after such authority shall be obtained, any holder of such obligation may, if he elect so to do, surrender the same and obtain a new certificate for such preferred stock, in such form as may be found appropriate; and when said authority shall be obtained, the holders of said obligations or of said new certificates shall be entitled to vote on their respective shares, in common with the other stockholders. And said corporation covenants and agrees not to issue any new or other shares of preferred stock which can in any way affect the rights or interests of holders of said

preferred stock, save and except such shares of preferred stock as said corporation shall issue to holders of the other bonds of said corporation secured by mortgage as hereinafter provided, and save and except that said corporation reserves to itself the right to issue shares of preferred stock which shall have priority over the preferred stock above described, in such manner and upon such terms, and at such times as it may find necessary or convenient for the purpose of providing for the extinguishment of the lien or mortgage of the State of Missouri for three millions of dollars, which constitutes the first lien upon said road, and the discharge of which is for the common interest of all the parties hereto.

Third. The holders of said bonds of said corporation bearing date the first day of July, A. D. 1858, upon placing the same and said coupons to be held in trust as hereinafter set forth, shall receive from said
16 corporation new bonds of said corporation bearing date the first day of July, A. D. 1863, for sixty per cent. of the principal sum named in said existing bonds, payable on the first day of July, in the year of our Lord one thousand eight hundred and eighty-three, without interest until the first day of July, one thousand eight hundred and sixty-four, but with interest-warrants or coupons for six months' interest attached thereto, payable on said first day of July, and on each first day of July and January, in each year thereafter, at the rate of seven per centum per annum, until the maturity of said bonds. And each of said parties so placing said bonds and coupons in trust, and his assigns, shall, as soon as the necessary legislative power can be obtained as aforesaid, be deemed a preferred holder of the stock of said corporation for the number of shares which, at one hundred dollars for each share, shall be equal to forty per cent. of the principal sum named in the bonds so placed in trust, together with the whole of the sums payable on the unpaid coupons so placed in trust, up to and including the coupon falling due on the first day of January, A. D. 1864; and for the number of shares thus ascertained, shall receive the obligation, certificate, or contract of said corporation, in the same form, and transferable in the same manner as is hereinbefore provided in relation to the shares of preferred stock to be issued to holders of said bonds bearing date the first day of April, A. D. 1856, and shall be entitled to the same preferred dividen's, and all other the rights and privileges that pertain to the holders of preferred stock so to be issued to parties holding said bonds bearing date the first day of April, A. D. 1856, as hereinbefore set forth, and to the benefit of the covenant of said corporation not to issue any other shares of preferred stock, with the savings and limitations hereinbefore provided.

17 Fourth. That the holders of said bonds of said corporation bearing date the fifteenth day of November, A. D. 1859, upon the placing thereof and of the said coupons, in trust as aforesaid, to be held as hereinafter set forth, shall, and their assigns, as soon as the necessary legislative power can be obtained as aforesaid, be deemed preferred holders of the stock of said corporation, of the number of shares which, at one hundred dollars for each share, shall be equal to the principal sum named in the bonds so placed in trust, together with the amount of the unpaid coupons, up to and including the coupons falling due on the fifteenth day of May, 1864, and for the number of shares thus ascertained, shall receive the obligation, certificate, or contract of said corporation, in the same form, and transferable in the same manner as is hereinbefore provided in relation to the shares of preferred stock to be issued to holders of said bonds bearing date the first day of April, A. D. 1856, and shall be entitled to the same preferred dividends and all

other the rights and privileges that pertain to the holders of preferred stock so to be issued to parties holding said bonds bearing date the first day of April, A. D. 1856, as hereinbefore set forth, and to the benefit of the covenant of said corporation not to issue any other shares of preferred stock, with the savings and limitations hereinbefore provided.

Fifth. The bonds thus surrendered and placed in trust shall not be cancelled or deemed extinguished, but be held and managed as an existing security in the manner following, that is to say:

It all of the said bonds heretofore issued by said corporation, and secured by mortgages as aforesaid, shall not, by arrangement with the holders thereof, be surrendered and placed in trust as aforesaid, or substan-
18 tial provision, in the judgement of the parties of the second part, be made for their extinguishment within the period of five years from the date hereof, this agreement may be terminated at the discretion of said trustees, they giving notice as hereinafter provided; and the said new bonds and preferred stock, or the obligation of the corporation to issue the same, shall thereupon be void, and the holders thereof be entitled to receive back bonds and coupons from among those held in trust, in amount equal to those surrendered by them, first applying toward the payment of such coupons all sums received for interest or dividends on said new bonds or preferred stock; and further, if at any time, it shall be found by said corporation, or its directors, or by its said trustees, impracticable in their judgment to carry this arrangement into effect, they shall have the right to cancel the same by public notice in one or more newspapers published in the cities of New York and Boston, and thereupon the new bonds and preferred stock be void, and the bonds so held in trust shall be redelivered to the respective holders of the new bonds upon the terms and in the manner aforesaid. Unless and until this arrangement be cancelled and terminated in the manner hereinbefore provided, said trustees shall hold, manage, use, and dispose of each class of said bonds so placed in trust (all bonds of the same date being deemed a seperate class) in all contingencies and under all circumstances, so as to secure and receive for each class all the benefits which holders thereof are entitled to under the original mortgages made by said corporation, to secure the same, and all sums by them received toward the payment of the bonds or coupons of any one class, by virtue of the mortgage given to secure the same, shall be by said trustees, applied to the purchase and extinguishment of
19 the new bonds so issued in adjustment of bonds of that class, at the lowest market rate, after advertisement for proposals in one or more newspapers published in the cities of New York and Boston, provided said bonds can be purchased at not more than ten per cent. beyond their par value; otherwise said money may be invested by said trustees in such manner as they may deem discreet, in said bonds or otherwise; and when said investment shall not be made in said bonds, said investment may be changed from time to time, as the trustees shall think prudent, but the same to be ultimately applied to the purchase or extinguishment of said new bonds. Unless and until this arrangement be cancelled and terminated in the manner hereinbefore provided, the several parties, holders of said bonds bearing date the first day of April, A. D. 1856, or of the new bonds issued upon the surrender and placing the said old bonds in trust, may arrange with the parties of the second part to use the bonds and coupons thus placed in trust in the purchase of lands pursuant to the provisions of the existing mortgage, they surrendering to the said trustees the new bonds and an amount of the preferred stock equal to that issued to the holder at the

time said bonds were so placed in trust. Whensoever all the said bonds and coupons of said corporation, heretofore secured by mortgage as aforesaid, shall be placed in trust as aforesaid, or provision for the extinction thereof shall have been made as hereinbefore provided, said parties of the second part may, in order to enable said corporation to raise money to discharge the said prior lien of the State of Missouri, cancel and discharge, in such form as shall be found appropriate, the mortgages heretofore made by said corporation upon its road, franchise, rolling-stock, and property, (exclusive of its lands,) to secure said bonds thus held in trust: provided, and on condition that
20 new mortgages be made of said road, franchise, rolling-stock, and property to said trustees immediately after, and subject only to said proposed mortgage made to raise money to discharge said lien of the State of Missouri, and in such form and order of priority as shall secure to the holders of said bonds thus placed in trust, their respective rights, by way of security, in said road, franchise, rolling-stock, and property, in the order of preference created by said mortgages thus discharged, and so that said new mortgages shall be as effectual as the mortgages thus discharged, except as to the priority thus to be given to the said mortgages made for the purpose of obtaining means to discharge said lien of the State of Missouri, which now has a priority over all subsisting mortgages. If, at any time, said corporation shall make default in the payment of said new bonds, or any of the coupons attached thereto, the trustees shall, upon the written application of holders of bonds of the two classes, bearing date April 1, 1856, July 1, 1858, respectively, equal in amount to one-half of those outstanding and unpaid, use and exercise all the remedies of every description provided in and by said existing mortgages to be used and exercised in case of breach by said corporation of the conditions thereof, the parties thus applying to said trustees, indemnifying them for all expenses in case they shall require the same; and all monies received by said trustees toward the payment or satisfaction of the bonds thus held by them in trust, from the exercise and use of said powers and rights, by the sale and disposition of said lands, road, rolling-stock and property, shall, after deducting all expenses and their own reasonable compensation, be by them applied toward the payment and discharge of said old bonds thus by them held in trust, in such manner as will secure
21 to the holders of each class of bonds, their priority created by said several mortgages; and the same shall be distributed among the parties who have placed their said bonds in trust accordingly, they surrendering the new bonds and preferred stock issued by said corporation under this arrangement.

Sixth. It is mutually agreed between the parties hereto, as well as by all parties who, by the exchange and surrender of their bonds, shall become interested in the trusts and agreement herein contained, and by their assigns, that the several provisions contained in the existing mortgage deed of said corporation to said Swift, Bartlett, and John E. Thayer, bearing date the 1st day of April, in the year of our Lord one thousand eight hundred and fifty-six, in relation to the death, resignation, or inability of the trustees therein named, and the appointment of successors in said trust, shall be, and they are hereby, adopted, and form part of this agreement; and that the parties of the second part hereto, their successors, heirs, executors, and administrators, shall not be answerable for the acts, defaults, or omissions of each other, and that each shall be answerable only, for gross negligence and wilful default. And further, that said parties of the second part, and their successors,

shall and may, from out of any funds in their hands, retain all expenses and a just and reasonable compensation for their services.

Seventh. Said parties of the second part do hereby accept said trust, and severally covenant faithfully to perform the same, in subordination, however, to the trusts and duties imposed on them by said mortgage, bearing date the said first day of April, in the year of our Lord one thousand eight hundred and fifty-six, and to all other the existing trusts.

In witness whereof, the Hannibal and St. Joseph Railroad
22 Company have caused their corporate seal to be hereto affixed, and the same to be signed by John W. Brooks, the chairman of its board of directors for that purpose duly authorized, and the said parties of the second part have hereto set their hands and seals, the day and year first above mentioned.

[SEAL.] JOHN W. BROOKS, *Chairman.*
WILLIAM H. SWIFT. [SEAL.]
SIDNEY BARTLETT. [SEAL.]
NATHANIEL THAYER. [SEAL.]

Executed and delivered in presence of—

Exhibit B annexed to bill of complaint.

"Exhibit B," referred to in the foregoing bill of complaint, is in the following words and figures, to wit:

Number.] STATE OF MISSOURI. [Share.

Hannibal and St. Joseph Railroad Company.

Preferred stock.

Shares..... ..... $100 each.

Seven per cent.

Issued in adjustment of the bonds of said company, bearing date April 1st, 1856, July 1st, 1858, and March 15th, 1859, and subject to the terms and conditions of an indenture between said corporation and William H. Swift and others, trustees, dated April 1st, 1863, and with the rights set forth therein, and may be transferred upon the books of the company, and new certificates issued, and may be used with the bonds of said company, bearing date April 1st, 1863, in the purchase of its lands as provided in said indenture.

23 The Hannibal and St. Joseph Railroad Company hereby certify that, in consideration of the surrender and placing in trust of bonds and coupons, in pursuance of said indenture, that is entitled to shares of the preferred stock of said corporation, and to receive all the net earnings of said company, which may be divided pursuant to said indenture, in each year up to $7 per share, and to share in any surplus beyond $7 per share, which may be divided upon the common stock.

Witness the signature of the treasurer of the fiscal agency at Boston, Mass., &c., &c.

Exhibit C annexed to bill of complaint.

"Exhibit C," referred to in the foregoing bill of complaint, is in the following words and figures, to wit:

An act authorizing the Hannibal and St. Joseph Railroad Co. to convert its bonds into preferred stock.

Be it enacted by the general assembly of the State of Missouri, as follows:

SEC. 1. That the Hannibal and St. Joseph Railroad Company be, and it is hereby, authorized to issue preferred stock to parties now holding its bonds, which may be used in partial or total extinguishment thereof, upon such terms and with such rights as may be agreed upon with such parties, provided that the preferred stock, authorized to be issued by this act, shall not in any manner have preference over the first-mortgage lien, now held by the State, on said road to secure the three million dollars in bonds advanced to said road by the State, and nothing in this act shall be so construed as to invalidate, effect, or supercede
24 said lien as it existed prior to the passage of this act, but said stock shall in all cases be subject and subordinate to said lien of this State, provided that, in declaring dividends, the preferred stock hereby provided for shall have a preference over ordinary stock to the amount of seven per cent per annum, and no more.

SEC. 2. This act to take effect from and after its passage.

Approved January 21, 1864.

And afterwards, in vacation of said circuit court the following proceedings were had in this cause on the seventeenth day of November, A. D. 1870.

Order for subpœna.

JOHN BAILEY, COMPLAINANT, *ag'st* THE HANNIBAL & ST. JOSEPH RAILROAD COMPRNY, defendant. } In chancery.

This day comes the complainant, by his solicitors, and files his bill in chancery against the defendant in this cause, and, on motion of said solicitors, it is ordered that a subpœna in chancery be issued in this cause, returnable to rules on the first Monday of January next.

And afterwards, on the twenty-first day of November, A. D. 1870, there was issued out of the clerk's office of the said circuit court the following subpœna in chancery.

Subpœna.

MISSOURI DISTRICTS, *set:*

25 The President of the United States to the Hannibal and St. Joseph Railroad Company, greeting:

You are hereby commanded to be and appear at rules to be held at the office of the clerk of the circuit court of the United States for the districts of Missouri, on the first Monday of January next, at the city of St. Louis, then and there to answer the bill of complaint of John Bailey, a citizen of the State of New Jersey, filed against you on the seventeenth day of November, 1870. Hereof fail not.

Witness the Honorable Salmon P. Chase, Chief Justice of the United States, the twenty-first day of November, 1870. Issued at office in the city of St. Louis, under the seal of said court, the day and year last aforesaid.

[SEAL.] BEN. F. HICKMAN, *Clerk.*

MEM.—The defendant to enter its appearance in this suit in the clerk's

office, on or before the day at which the writ is returnable; otherwise the bill may be taken pro confesso.

BEN. F. HICKMAN, *Clerk.*

Return, acknowledgement of service.

This writ was returned into the clerk's office of said court bearing the following endorsement, to wit:

I hereby confess due service, & agree to appear for the Hannibal & St. Joseph R. R. Co. in the action.

THO'S T. GANTT,
Sol. for Def't.

NOVEMBER 26, '70.

And at chambers of said circuit court the following further proceedings were had in this cause on Thursday, Nov. 17th, 1870, to wit:

26 *Preliminary injunction.*

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMpany, defendant. } In chancery.

This day come the parties herein, complainant and defendant, by their respective solicitors, and the application of said complainant for a preliminary injunction against the said defendant, in accordance with the prayer of complainant's bill herein, was taken up before the Honorable Samuel Treat, one of the judges of this court, and was argued by counsel and submitted. And said judge having considered said application and the arguments of counsel thereon, and being fully advised of and concerning the premises: It is ordered that the defendant, The Hannibal & St. Joseph Railroad Company, its officers, directors, agents, and servants be, and they are hereby, enjoined and restrained, until the further order of this court, from paying any other or further dividend upon the common or unpreferred stock of said company until the said company shall have set apart the sum of three thousand dollars, out of the earnings of said company, as a sum sufficient to pay to said complainant a dividend equal to said three thousand dollars upon the stock of said company held by him.

Order requiring bond of complainant.

And it is further ordered that said complainant give bond in the sum of one thousand dollars to pay any damages caused hereby.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this case on Thursday, Dec. 1st, 1870, to wit:

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMpany, defendant. } In chancery.

27 *Bond filed.*

This day comes the complainant, by his solicitor, and files the bond by him required to be given in accordance with the order of this court, heretofore made herein.

And the bond filed as aforesaid, is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, John R. Shepley, as principal, and Samuel T. Glover, as security, are held and firmly bound unto the Hannibal & St. Joseph Railroad Co. & its assigns, in the full and just sum of one thousand dollars; for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this thirtieth day of November, 1870.

The condition of the above obligation is such, that whereas John Bailey did, on the 17th day of November, 1870, file his bill of complaint against said Hannibal & St. Joseph Railroad Company, in the circuit court of the United States for the districts of Missouri, in which he prayed for an injunction against said company; and on said last named day Samuel Treat, one of the judges of said court, did make an order in said cause, enjoining & restraining said company until the further order of the said court, from paying any other or further dividend upon the common or unpreferred stock of said company until said company shall have set apart the sum of three thousand dollars, out of the earnings of said company, as a sum sufficient to pay to said complainant a dividend equal to said three thousand dollars upon the stock of said company held by said complainant:

Now, if said complainant, John Bailey, shall prosecute his said suit with effect, or shall pay to said Hannibal & St. Joseph Railroad any damages or cost that may accrue to said company, or be occasioned by the said injunction or restrain'g order so granted as aforesaid, this obligation shall be void; otherwise to remain in full force & virtue.

JOHN R. SHEPLEY. [SEAL.]
SAMUEL T. GLOVER. [SEAL.]

28 And afterwards, in vacation of said circuit court, the following further proceedings were had in this case on January 4, 1871.

Appearance of def't.

JOHN BAILEY, COMPLAINANT, *ag'st* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, defendant. } In chancery.

This day comes the defendant, by its solicitor, and enters its appearance to the bill of complaint herein against it.

And the appearance entered as aforesaid, is in the following words & figures, to wit:

JNO. BAILEY *vs.* THE HANNIBAL & ST. JOSEPH R. R. COMPANY. } January rules, 1871.

The defendant comes and enters its appearance to the bill of complaint in this cause.

THO'S T. GANTT,
Sol. for the Hannibal & St. Jo. R. R. Co.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this cause on Friday, February 10, 1871:

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMpany, defendant. } In chancery.

This day comes the defendant, by its solicitor, and files its answer to the bill of complaint herein against it.

And the answer filed as aforesaid, is in the following words and figures, to wit:

29 *Defendant's answer.*

In the circuit court of the United States for Missouri.

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMpany, defendant. } In chancery.

The answer of the Hannibal and St. Joseph Railroad Company to the bill of complaint in this cause filed.

This respondent, reserving to itself now, and at all times hereafter, all and all manner of exception to the said bill of complaint on account of the many and gross errors, uncertainties, and imperfections therein contained, yet for answer to so much and to such parts thereof as this respondent is advised that it is necessary or material to answer unto, saith that the incorporation of this defendant by the several acts of the legislature or general assembly of Missouri, referred to in said bill, and to which this defendant also refers for the ascertainment of their terms with greater certainty, the organization of said defendant, the issue, prior to 1863, of certificates for the common or unpreferred stock of said defendant, as stated in said bill, in shares of one hundred dollars each, & the construction and operation of the Hannibal & St. Joseph Railroad prior to April 1, 1863, are admitted, as stated in the said bill of complaint. This respondent also admits that, prior to 15th October, 1862, this respondent had issued its bonds, and secured the same by its deed of mortgage, substantially as stated in said bill; that these bonds had passed into the hands of divers holders for value, and that, prior to 15th October, 1862, the affairs of this respondent were in so embarrassed a condition that, being unable to pay the interest on said bonds, this respondent at that time consulted respecting some means of extricating itself from the difficulties then pressing upon it, and improving its securities. And respondent says that, on the 15th day of October, 1862, the said respondent sent to each holder
30 of the bonds issued as aforesaid by the Hannibal & St. Joseph Railroad Company, a circular, a copy of which is herewith filed, marked "Exhibit A," of the defendant's answer, wherein and whereby it was proposed by this respondent to the said several holders of its bonds, in view of the embarrassed condition of respondent, amongst other things, to convert a part of the bonds theretofore issued by said respondent into what was in the said circular called "preferred stock."

And the respondent prays that the said exhibit may be taken as part of this answer. And respondent says that, in and by said circular the nature of this preferred stock was defined to be such that its holders should have and receive all the net earnings of the said railroad in any one year up to seven dollars on each share of one hundred dollars of such preferred stock; and, also, that if there should be of such net earnings in any year over and above seven dollars on each share of such preferred stock, and seven dollars on each share of the common or unpreferred stock before that time issued by said respondent, any surplus, then that the holders of the preferred and unpreferred stock of said respondent, should share such surplus ratably; all of which will more fully appear by reference to the said copy of said circular, made an exhibit to this answer as aforesaid. And this respondent says that the said circular was sent to all the holders of the bonds of the said respondent, and that the terms and conditions thereof were formally accepted and approved by a large majority of such holders, and particularly by the holders of all the bonds of respondent which were in part converted into preferred stock before the 24th November, 1862; and that, on the said 24th November, 1862, the said respondent, by a vote of its board of directors, resolved that Messrs. Bartlett, Thayer, and Hunnewell be appointed a committee with power to carry into effect the intentions of the said circular of October 15, 1862,
31 (being the same circular which is shown by Exhibit A.) And the said committee, accepting the duty so to them assigned, prepared an indenture in fulfillment thereof, and submitted the same, bearing date April 1, 1863, to a stockholders' meeting, convened on the 30th May, 1863, by order of the board of directors of said respondent. And, on said 30 May, 1863, the stockholders of said respondent so convened, did ratify and accept the action of the said committee and said board of directors, and ordered the said indenture to be duly executed and delivered, which was done. And said indenture, the same which is shown (by copy) in Exhibit A to the bill of complaint in this cause, and in conformity with the terms of the said circular, dated October 15, 1862, and said indenture dated 1 April, 1863, divers of the holders of the bonds of respondent surrendered the same, and received therefor the equivalent stipulated for in said circular and indenture, part thereof being the preferred stock of this respondent, as defined in said circular and indenture, all the certificates of which are in the same form. And a copy in blank thereof is appended to the said Exhibit A of this respondent, marked C, which, also, this respondent prays may be taken as part of this answer. And respondent, further answering, says that all the preferred stock of the said complainant by him held and mentioned in his said bill of complaint, was by this respondent issued under and in conformity with the terms and conditions of the said circular and iudenture, and that the certificates therefor are all of the form shown above, appended to respondent's Exhibit (A.) And, by virtue of the said certificates of preferred stock in the Hannibal & St. Joseph Railroad Company, the said respondent says that the said complainant is entitled to all the privileges, advantages, priority, and preference provided in respect of such preferred stock, in and by the terms of said certificates, and in and by the terms of said circular and inden-
32 ture, and to all the dividends payable to the holder of such preferred stock, and to no other or further dividends, privileges, advantages, priority, or preference, and that the benefits, dividends, privileges, advantages, priority, and preference to which the holders of such preferred stock are entitled, consist in and are the following,

and no more; that is to say, that of the net earnings of this respondent in any one year the holders of such preferred stock aforesaid, are entitled, in preference to the holders of the unpreferred or common stock of said respondent, and in priority to them, all or so much of such net earnings as shall be equal to seven dollars on each share of such preferred stock, which payment is to be made to the holders of such preferred stock in full, before the holders of the common or unpreferred stock of said respondent are or can be entitled to receive any part of said net earnings; and after first satisfying the said claim of the holders of such preferred stock in full, the said respondent is bound to pay to the holders of the common or unpreferred stock of said respondent, any dividend per share for which it may be sufficient, not to exceed seven dollars for each and every share of such unpreferred stock. And if, after satisfying and paying seven dollars per share, first and by way of preference and priority on the preferred stock, and afterwards on the common or unpreferred stock of respondent, as aforesaid, there should be any surplus, then the holders of the unpreferred and preferred stock of respondent shall share the same ratably. And this respondent saith that it has always been, since the accruing of net earnings applicable to the payment of dividends, to wit, in the spring of the year 1870, as stated in said bill of complaint, ready and willing, and has offered to distribute to the complainant, and to pay to him his due and proper proportion or dividends, ascertained and declared, as hereinbefore is stated, but that the said complainant
33 wrongfully demands the proportion or dividends of the said net earnings shown and claimed in his said bill of complaint, all of which is against equity and good conscience. And the said respondent therefore prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

THOMAS T. GANTT,
Solicitor of Defendant.

Affidavit hereto is waived.

GLOVER & SHEPLEY,
Sol's for Compl't.

Exhibit "A" of answer.

"Exhibit A," referred to in the foregoing answer to bill of complaint, is in the words and figures following, to wit:

HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

Plan for extricating it from its present difficulties and improving its securities.

The war has brought such embarrassments upon this property as to render vigorous measures necessary to save it from great peril and possibly the most fatal results. Any attempt to make the property available otherwise than by most carefully preserving it through its present depression must prove disastrous to all concerned. What the property requires is to have the accumulation of its liabilities stopped for a time to enable it to recover from its late disasters, and to have them thenceforward so moderate in amount that the less sanguine of its proprietors shall feel confident of its ability to meet them. What will best meet the interests of the proprietors is—

1st. Having the property extricated from its present involved position and freed from the perils to which it is exposed.

2nd. Having so much of their securities as they feel sure the
34 road can make good seperated from the rest, that the doubt which now hangs over the whole shall no longer affect this portion, while that upon which the whole of the doubt is thrown shall be kept in a position to avail of any increased value which time may develope.

To meet in an equitable manner the requirements it is proposed—

1st. Land bonds.—Give to the holders of the land-bonds 70 per cent. of the principal in like bonds. For the remaining 30 per cent. of the principal and the unpaid coupons up to and including those falling due October 1, 1863, give preferred stock, with an additional amount of such stock equal to 20 per cent as a bonus.

2d. Convertible bonds.—Give to the holders of convertible bonds, which, equally with the land-bonds, are first-mortgage on the road, 60 per cent. of the principal in like bonds. For the remaining 40 per cent. of principal and unpaid coupons up to and including that falling due January 1, 1864, give preferred stock.

3d. 2d-mortgage bonds.—Give to the holders of 2d-mortgage bonds and the unpaid coupons up to and including that falling due May 15, 1864, preferred stock.

4th. The income bonds to be cancelled and treated the same as the coupons of the class for which they were exchanged.

Under this arrangement, for example, $10,000 of land-bonds will be exchanged for $7,000 in like bonds, and $6,120 in preferred stock, which will buy $12,100 worth of land at cash prices, that being the amount of the original bonds and coupons exchanged; the preferred stock to be 7 per cent. and not cumulative, but to share with the common stock any surplus which may be carried over and above 7 per cent. upon both in any one year.

5th. Land-bonds to be receivable for lands, and, at the option of the holder, there will be received therewith, in any preferred stock,
35 that proportion which has been given, in part exchange for land-bonds, such preferred stock to be received at the rate which land-bonds were exchanged for it, which is 83⅓ per cent. of its face.

6th. There will be but one class of preferred stock. More would create confusion; their relative merits would not be clearly understood in the market, and all would thereby be depreciated. To avoid this confusion and loss, and still do justice to the holders of land-bonds, the bonus of 20 per cent. is given.

As this plan for consolidating and reducing the liabilities of the company shows that an early dividend on the preferred stock may be reasonably expected, this 20-per-cent. bonus will result thus:

1st. Preferred stock may be used with the bonds at the rate of 83⅓ per cent. to buy lands. If thus used, the holder will get his whole original bond and coupon in land.

2nd. If not so used, then the holders of the preferred stock will get dividends on this 20-per-cent. bonus permanently.

6th. The right to use with the land-bonds any of the preferred stock to purchase lands will add to the value of these bonds, as it will keep in them all the value the land is capable of giving. It will also enable the holder to sell his bonds and his stock seperately to better advantage.

7th. As the sale of lands will ultimately absorb nearly or quite as much preferred stock as that portion exchanged for land-bonds, the *the* bonus which is given to the holders will nearly or quite disappear. And

if the stock becomes valuable, those holders of land-bonds who keep it will receive permanently the dividends upon their bonus, without having their preferred stock depreciated by its addition to the general amount.

8th. Money received for lands will be used to buy land-bonds of those who will sell cheapest, at not above par, in answer to proper advertisements.

36 The securities arranged upon this plan will stand as follows:

Reduce the land-bonds, which now are $4,869,000, to 70 per cent. of their par value	$3,408,300
Reduce the convertible $1,370,000 to 60 per cent	822,000
	$4,230,300

The annual interest payable by the company will be—	
To Missouri	$180,000
7 per cent. on $4,230,300	296,121
	$476,121

Preferred stock will consist of scaleage on land-bonds	$1,461,000
Add 20 per cent. bonus on ditto	292,200
Unpaid coupons on land-bonds, including coupon of Oct. 1, 1863	1,022,490
Add 20 per cent. bonus on ditto	204,498
Scaleage on convertible bonds	548,000
Unpaid coupons on convertible bonds, including coupon of Jan. 1, 1864	287,700
Second-mortgage bonds	1,200,000
Unpaid coupons on ditto, including coupon of May 15, 1864	294,000
	$5,309,888

If the coupons on the land-bonds, to and including the coupon of Oct. 1, 1863, and the coupons on the convertible bonds to and including the coupon of Jan. 1, 1864, and the coupons on the 2d-mortgage bonds, to and including the coupon of May 15, 1864, are converted as above into preferred stock, the interest due on the 1st Jan., 1864, will be—

37 Missouri State interest, including all unpaid interest to the State to that date	$450,000

The assets of the road to Jan. 1st, 1864, will be—

Estimated net receipts, not allowing for any increase in the business in 1863 over 1862	$449,000	
Due from Government Oct. 1, 1862	25,000	
Cash assets—after paying floating debt—available at an early day	25,572	
		$499,572
Surplus January 1, 1864		$49,572

OCTOBER 15, 1862.

Attached to "Exhibit A" of defendants' answer, and as a part thereof, are the papers marked "B" & "C;" which said papers are in the following words and figures, to wit:

"B."] *Exhibit "B" of def't's ans.*

Number.] STATE OF MISSOURI. [Shares.

Hannibal & St. Joseph Railroad Company.

Preferred certificate and obligation.

Shares.....$100 each.

Seven per cent.

Issued in adjustment of the bonds of said company, bearing date April 1st, 1856, July 1st, 1858, and March 15th, 1859, and subject to the terms and conditions of an indenture between said corporation and William H. Swift and others, trustees, dated April 1st, 1863, and with the rights set forth therein, and may be transferred upon the books of the company and new certificates issued, and may be used, with the bonds of said company bearing date April 1st, 1863, in the purchase of its lands as provided in said indenture.

38 The Hannibal & St. Joseph Railroad Company hereby certifies that, in consideration of the surrender and placing in trust of bonds and coupons in pursuance of said indenture, *that* is entitled to shares of the preferred stock of said corporation, after the requisite authority shall be obtained to issue the same, and shall be entitled to receive all the net earnings of said company which may be divided pursuant to said indenture in each year, up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock.

Witness the seal of the corporation and the signatures of the transfer agent and one of the directors, at Boston, Mass., the day of , A. D. 186 .

Transfer Agent.

Countersigned, and the surrendered certificate, No. , cancelled by me.

One of the Directors.

"C."] *Exhibit "C" of def't's answer.*

Number.] STATE OF MISSOURI. [Shares.

Hannibal and St. Joseph Railroad Company.

Preferred stock.

Shares.....$100 each.

Seven per cent.

Issued in adjustment of the bonds of said company, bearing date April 1st, 1856, July 1st, 1858, and March 15, 1859, and subject to the terms and conditions of an indenture between said corporation and

William H. Swift and others, trustees, dated April 1st, 1863, and with the rights set forth therein, and may be transferred upon the books of the company and new certificates issued, and may be used, with
39 the bonds of said company bearing date April 1st, 1863, in the purchase of its lands, as provided in said indenture.

The Hannibal and St. Joseph Railroad Company hereby certifies that, in consideration of the surrender and placing in trust of bonds and coupons in pursuance of said indenture, *that* is entitled to shares of the preferred stock of said corporation, and to receive all the net earnings of said company which may be divided pursuant to said indenture in each year, up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock.

Witness the seal of the corporation and the signatures of the transfer agent and of one of the directors, at Boston, Mass., the day of , A. D. 186 .

Transfer Agent.

Countersigned, and the surrendered certificate, No. , cancelled by me.

One of the Directors.

Certificate attached to Exhibits "A," " B," & " C" of def't's answer.

The foregoing papers, marked "A," " B," & "C," are certified to as being true copies of the original documents, respectively, in the following words and figures, to wit:

I, R. S. Watson, treasurer of the fiscal agency of the Hannibal & St. Joseph Railroad Company, on oath depose and say that the paper hereto annexed, marked A, is a true copy of an original circular issued by the Hannibal & St. Joseph Railroad Company, at the date thereof, to the holders of the several securities of said company, therein referred to. I further depose and say that the paper hereto annexed, marked B, is a true copy of the original agreement or certificate in relation
40 to preferred stock issued by said company to the parties who surrendered their securities in pursuance of the circular hereinbefore referred to, marked A, before the passage of the act of the legislature of Missouri, authorizing said company to issue preferred stock. & I further state that the paper hereto annexed, marked "C," is a true copy of the certificates of preferred stock issued by said company in exchange and upon the surrender of the certificates or contract marked B, hereinbefore referred to, after the act of the legislature of Missouri authorizing the company to issue preferred stock.

R. S. WATSON.

STATE OF MASSACHUSETTS,
County of Suffolk, City of Boston, ss:

On this fifteenth day of November, A. D. eighteen hundred and seventy, before the subscriber, a notary public, duly commissioned and sworn, in and for the county of Suffolk, and practicing in the city of Boston, personally appeared R. S. Watson, to me personally known to be the same individual described in and whose name is subscribed to the foregoing affidavit, who, being by me duly sworn, did depose and say that said affidavit by him subscribed is true.

In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year first above written.

[SEAL.] A. W. ADAMS,
Notary Public.

And afterwards, in vacation of said circuit court, the following further proceedings were had in this cause, on Tuesday, March 28, 1871, to wit:

41 *Amended answer filed by def't.*

JOHN BAILEY
vs.
HANNIBAL & ST. JOSEPH RAILROAD COMPANY. } In chancery.

This day comes the defendant by its solicitor, and, with the consent of the solicitors for the complainant herein, files its amended answer to the bill of complaint heretofore filed herein against it.

Consent to file amended answer by plaintiff.

Mem. of complainant's counsel consenting to the filing of the foregoing amended answer.

BAILEY
vs.
HANNIBAL & ST. J. R. R. Co. } Application to the court in chancery to file amended answer.

The plaintiff consents that the court may consider this application without the personal presence of the undersigned.

GLOVER & SHEPLEY,
Solicitors for Compl't.

And the amended answer is in the following words and figures, to wit:

Amended answer.

In the United States circuit court for Missouri. In chancery.

JOHN BAILEY, COMPLAINANT,
vs.
THE HANNIBAL AND ST. JOSEPH RAILWAY Company, defendant.

The amended answer of defendant filed by leave of court.

This defendant now, and at all times hereafter, saving and reserving to itself all and all manner of exception to the many errors, un-
42 certainties, and other imperfections of the said bill of complaint; yet, for answer to so much thereof as it is advised by counsel that it is material for it to answer unto, saith: That it admits the incorporation of the defendant by the general assembly of Missouri, and that after its incorporation the defendant constructed and operated its road pursuant to its charter and the acts amendatory thereof, and issued certificates of stock, as stated in said bill, and also its bonds,

secured by deeds of mortgage, substantially as in said bill is stated, prior not only to April 1, 1863, but prior to October 15, 1862. And further answering, defendant says that, on the 15th October, 1862, finding itself in an embarrassed condition, it issued to all the holders of the bonds of defendant a circular, a copy whereof is herewith filed, marked Exhibit A of defendant's answer, entitled "Hannibal & St. Joseph Railroad Company, plan for extricating it from its present difficulties and improving its securities," whereby this defendant proposed to the several holders of its bonds, issued and secured as aforesaid, that the same should be exchanged for other bonds in part, and in part for preferred stock. And in and by the terms of said circular, the nature of the said preferred stock was defined and declared to be such that its holders should have the right to receive all the net earnings of the said defendant in any year up to seven dollars on each share of such preferred stock, and that if there should be of fresh net earnings in any year sufficient to pay not only seven dollars per share on all the preferred stock of defendant in preference and priority to the unpreferred or common stock, but also seven dollars on each share of the common stock, and a surplus over and above seven per cent. on both preferred and common stock, then that the holders of the preferred and unpreferred stock should share such surplus ratably; the words of the said circular in that behalf being, "The preferred stock to be seven
43 per cent. and not cumulative, but to share with the common stock any surplus which may be earned over and above seven per cent. on both in any one year," all of which will more fully appear by the said copy of the said circular, filed as aforesaid; and said circular was sent to each holder of the bonds of the defendant, and on the 24th November, 1862, or before that time, the said several holders of said bonds had accepted the terms thereof and signed an agreement, annexed to a copy of said circular, in the words and figures following: "We, the subscribers, owners of bonds issued by the Hannibal & St. Joseph Railroad Company of the kinds and amounts set against our names, respectively hereby agree to surrender the same and receive in exchange therefor new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities, dated October 15, 1862, and hereto annexed," all of which will more fully and at large appear by a copy of said agreement signed by the bondholders of defendant and delivered to the defendant before Nov. 24th, 1862, herewith filed, marked "Exhibit B of defendant's amended answer." And thereupon defendant did, on said 24 November, 1862, appoint a committee, composed of Messrs. Hunnewell, Bartlett, and Thayer, "with power to carry out the intentions of the circular aforesaid of 15 October, 1862," and the duties and powers of said committee were by the terms of their said appointment limited and defined to be, to effectuate the intentions of the said circular and the said acceptance of the terms thereof, all of which will appear by a copy of the resolution of the said defendant, adopted by the said defendant on the 24th November, 1862, herewith filed, and marked Exhibit C of defendant's amended answer. And the said committee accepting the said appointment and proceeding to perform the duties thereby on them imposed, prepared and reported to the defend-
44 ant in the month of April, 1863, an indenture, bearing date April 1, 1863, a copy of which is shown by "Exhibit A," filed by complainant with his bill of complaint. And this defendant files herewith a printed copy thereof, marked "Exhibit D of defendant's amended answer." And on the 24th April, 1863, defendant issued and duly pub-

lished a call for a meeting of its stockholders, to be held on 30th May, 1863, at Hannibal, in the State of Missouri, for the purpose of considering whether the corporation would authorize the execution and carrying into effect by appropriate means of the said agreement, made provisionally on and before 24th November, 1862, between the said corporation and the holders of its bonds, which agreement was supposed and understood by the said defendant to be substantially carried into effect by the draft of the said indenture, bearing date April 1, 1863, all of which will more fully appear by the copy of the said call herewith filed, and marked "Exhibit E of defendant's amended answer." And at the time and place named in said call the stockholders of the said company, (defendant,) by a large majority, voted for the ratification of the said agreement provisionally made as aforesaid, between the bondholders of the defendant and said defendant, on and before 24th November, 1862, and herein before shown as "Exhibit B of defendant's amended answer;" and did also authorize and direct the execution by said defendant's officers of the said indenture, dated April 1, 1863, and the issue of bonds and certificates of preferred stock in conformity with said agreement and indenture; and, in making said authorization and direction the said stockholders had regard to the terms of the said agreement, provisionally made and adopted as aforesaid between the defendant and its bondholders prior to the 24th November, 1862, as above in this answer set forth; and each and every one of said stockholders then and there supposed and believed that the said indenture merely effectuated and carried out, by appropriate means, the terms of said provisional agree-
45 ment, and at the same time and place, and, in order more completely to effectuate said purpose, the said stockholders did order and direct that the said board of directors of said corporation should prepare and adopt, in behalf of the said corportion, such certificates, in relation to the preferred stock to be issued under said agreement, as might be necessary to carry the proposed scheme into effect, and to cause the same to be exeeuted, in behalf of the said defendant, in such manner as the said board of directors should think best; all of which will at large and more fully appear by a copy, duly certified, of the minutes of the proceedings had at said stockholders' meeting herewith filed, and marked "Exhibit F of defendant's amended answer." And, on the 26th June, 1863, the said board of directors, in persuance of the authority in them vested and reposed by the said stockholders as aforesaid, did prepare and adopt, in behalf of said corporation, the form of a certificate in relation to the preferred stock to be issued by said defendant, and the said board of directors did prepare and adopt, as the form of such certificates, the drafts shown by the copy thereof herewith filed, and marked "Exhibit G, of defendant's amended answer." One of said drafts, marked No. 1, being the form in which all certificates of said preferred stock were issued by said corporation, (the defendant,) until the passage on the 21 January, 1864, of an act, entitled "An act authorizing the Hannibal & St. Joseph Railroad Company to convert its bonds into preferred stock" by the general assembly of the State of Missouri. And, after the date of that act, the certificates of preferred stock theretofore issued by said defendant, were called in, and, in lieu thereof, certificates were issued in the form of the draft, marked No. 2, and both of these forms were duly and regularly prepared and adopted by the board of directors of said defendant, and were acted on by the defendant in all its dealings with its bondholders subsequent to the 30th day of May, 1863, and were received by all the holders of

46 the said preferred stock of said defendant as a full compliance with, and satisfaction of, the terms and true meaning of said agreement and indenture; and all the certificates of preferred stock held by said complainant are of the form shown by draft No. 2, above referred to; and all of the certificates of the said preferred stock of defendant held by any and all persons are of the same form; and in and by all of said certificates it is declared and witnessed that the holder thereof is entitled to receive all the net earnings of said company (this defendant) that may be divided in each year up to seven dollars on each share of such preferred stock, and also to share in any surplus beyond seven dollars per share, which may be divided upon the common or unpreferred stock.

And defendant, further answering, saith that it has always been ready and willing to reckon and account with the said complainant as to his preferred stock by him held upon the basis aforesaid, conceding that the holders of said preferred stock are entitled to receive of the net earnings of the defendant in any year in preference to and in priority over the holders of the common or unpreferred stock of the defendant, the whole thereof up to seven dollars per share of such preferred stock before the holders of such unpreferred stock can receive any part of such net earnings; that if it should come to pass that the net earnings of said defendant in any year should not be more than seven dollars for each share of such preferred stock, then the holders of such preferred stock will receive the whole thereof, to the exclusion of the holders of the common or unpreferred stock; that in case the net earnings of said defendant in any year should exceed seven dollars for each share of the said preferred stock, the holders of the common or unpreferred stock will be entitled to receive the excess, or so much thereof as will amount to seven dollars on each share of such common or unpreferred stock; and if there be any surplus beyond seven dollars per share on both the preferred and unpreferred stock in any year that such surplus shall be shared by the holders of the preferred and unpreferred

47 stock of said defendant. And defendant saith that the complainant is not entitled to any other or further privileges, rights, or advantages, in respect of his said preferred stock, than are in this answer shown; and that if the language of the said indenture be capable of any construction different from that of the said circular, dated 15th October, 1862, the said agreement, made by the bondholders on or before November 24, 1862, and the said certificates of preferred stock, then the language of the said indenture was mistakenly used and adopted by the stockholders of the said defendant, and that the said indenture only reflects, expresses, and declares the meaning of the said defendant, its stockholders assembled on the 30th May, 1863, its bondholders at that time, and the holders of its preferred stock, so far forth as it carries into effect the terms of the said agreement, provisionally made before 24 November, 1862, between the defendant and its bondholders. And defendant further says that the true intent and meaning of the said indenture, and the acquiescence of the said bondholders therein, were afterwards shown and acknowledged, and the same was practically interpreted by the respective parties thereto, by the preparation of the forms of preferred stock certificates on the 26th June, 1863, by the said defendant, and the acceptance of these by the complainant and all other holders of preferred stock as a full and ultimate compliance with and satisfaction of the letter and spirit of the agreement, provisionally made as aforesaid between defendant and its bond-

holders before November 24, 1862. And, having thus answered, defendant prays to be hence dismissed with its reasonable costs.

THO'S T. GANTT & JAMES CARR,
Solicitor' for Defendant.

And the exhibits referred to in the foregoing amended answer of defendant are, respectively, in the words and figures following, to wit:

48 *Ex. A of def't's amended answer.—Plan.*

"Exhibit A, of defendant's amended answer." (See "Exhibit A" defendant's answer, pages 33 to 35 of this transcript.)

Exhibit B of def't's amended answer.—Consent of bondholders.

Exhibit B of defendant's amended answer.

We, the subscribers, owners of bonds issued by the Hannibal & St. Joseph Railroad Company, of the kinds and amounts set against our names, respectively, hereby agree to surrender the same, and receive in exchange therefor new bonds and preferred stock, in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities, dated October 15, 1862, and hereunto annexed.

Provided, That our bonds shall not, by their surrender, be deemed to have been paid, cancelled, or extinguished, but shall be held by trustees until this arrangement be completed or terminated; to the end that, if, from any cause, it shall be found by the corporation that it cannot be effectually carried out, no advantage shall be gained by those who do not exchange, but, by a re-exchange, all may be returned to their original position.

And, further, as no authority exists for issuing preferred stock, until such authority be obtained, there be issued, in lieu thereof, scrip, in one hundred-dollar shares, which shall be registered, and transferrable in the same manner as stock, and entitled to all the dividend rights of such preferred stock for which it may be exchanged when the requisite legislation shall be obtained.

49

Names.	Land bonds Amount.	Convertible bonds. Amount.	Second mortgage bonds. Amount.
H. H. Hunnewell	81,000	117,000	160,000
H. H. Hunnewell	30,000		
Do. trustee	35,000		
Do.	100,000		
S. Bartlett	33,000	27,000	14,000
J. M. Forbes, for self, & as trustee	4,000	73,000	88,000
" " " trustee		16,000	31,000
Sam'l Girard, for sundry parties	481,000	109,000	68,000
Edw'd L. Baker, for self & others	80,000	15,000	
R. S. Watson		14,000	
J. E. Thayer & Brother, for sundry parties	650,000	315,000	400,000
B. T. Reese	30,000		
John Duff	200,000		
Tho's A. Curtis, Dan'l Sargent Curtis, att'y,	100,000	5,000	
H. P. Kidder	5,000		
Oliver Brewster	14,000		

Names.	Land bonds. Amount.	Convertible bonds. Amount.	Second mortgage bonds. Amount.
J. Iranus Inckerman, trustee	1,000	10,000	
Edw'd L. Baker, for sundry parties, in addition	30,000	20,000	
Charles D. Cleaveland, by H. W. Suter, att'y	2,000		
John Rogers	4,000		
George May	10,000		
W'm B. Howes, trustee	10,000		
50 McCalmont, Bro's & Co., by J. E. T. & Bro., as per letter, dated Nov. 29, 1862	300,000	85,000	140,000
H. B. Rogers, trustee, by J. E. T, & Bro			166,000
J. C. Brown, by N. Thayer	30,000		
P. S. Forbes, by J. M. Forbes & Co		46,000	87,000
Edw'd L. Baker, for sundry parties, in addition	63,500	13,000	
J. W. Brooks	12,000		
J. C. Green	290,000	27,000	
E. P. Bancroft	23,000		
A. H. Fiske	5,000		
T. Wiggins & Co., by J. E. T. & Bro., as per letter dated Dec. 13, '62	53,000	15,000	
J. Amory Davis	5,000		
(Signed) H. H. Thomas, N. Y	6,000		
" J. E. Williams, " "	5,000		
" Edward Everett, Boston	5,000		
" H. Sidney Everett, "	6,000		
" T. H. Perkins		14,000	5,000
" J. J. James	5,000		
" Cha's Gould, N. Y		8,000	
" Watts Sherman	6,000		
" W. H. Swift	20,000	5,000	4,000
" Do adm'n	5,000		
" M. B. Parkman, by P. M. P	11,000		
" Alex. Duncan	195,000		
" Geo. Peabody	30,000		
" Marshall Warts	17,000		
51 " T. Wiggins & Co., for sundry parties, as per letter of Dec. 20	45,000	41,000	
" Stephen H. Perkins	5,000		
" John L. Lathrop	9,500	3,000	
" Major John Wayne	6,000		
Stephen G. Deblers	1,000		
H. S. McComb	38,000	9,000	
(Signed) W'm Stevens	1,000		
" W'm Bell	6,000		
" Henry I. Bigelow	40,000		
" F. H. Story	5,000		
" Jno. L. Aspinwall	8,000		
" John Maxwell	5,000		
" S. W. Comstock	86,000	32,000	14,000
" Schuchard & Gebhard	50,000		
" Delaney, Joslin & Clarke		22,000	
" Alfred Clark	11,500		
" E. J. Taylor	3,000		
" Sam'l S. Bruce	3,000		
" John Monroe & Co	5,000		
" A. Norrie	7,000		
" E. K. Alburtus, for self & J. Depperman	3,000	10,000	
" C. M. Carryl	9,000	14,000	
" T. Wiggins & Co., further amo	13,000		
" Edw'd Larned	14,000		
" W'm Pollock, N. Y., by letter	25,000		
" Ignatus Sargent, for H. G. Codman		10,000	
52 (Signed) Ignatius Sargent, for self & C. Sprague			23,000
" A. C. Richards	1,000	8,000	
" W'm H. King	55,000		
" Edw'd King	50,000		
Samuel Lord	6,000		
(Signed) James W. Seaver	20,000	8,000	

"Exhibit C" of deft's amended answer.

Exhibit C of defendant's amended answer.

The adjourned meeting of the board was held this day. Present (6,) J. W. Brooks, W'm Boolt, N. Thayer, S. Bartlett, H. H. Hunnewell, H. P. Kidder.

On motion of J. W. Brooks, sec'd by W. Boolt,
Voted that Messrs. Bartlett, Thayer, & Hunnewell be, and they are hereby, appointed a committee, with power to carry out the intention of the circular of October 15, 1862, entitled a "Plan for extricating it from its present difficulties and improving its securities," and that they are authorized to make such expenditures therefor as to them may seem discreet.

Ex. D of def't's amended ans.

Exhibit D of defendant's amended answer.

(See Exhibit "A" complainants bill of complaint, pages 10 to 22 inclusive.)

Exhibit E of def't's amend. ans.

Exhibit E of defendant's amended answer.

HANNIBAL, MO., *May* 30, 1863.

In pursuance of the following call for a meeting of the stock-
53 holders of the Hannibal & St. Joseph Railroad Company, published for more than two weeks in the St. Joseph Herald, a newspaper printed in St. Joseph, and in the North Missouri Courier, a newspaper printed in Hannibal, both in the State of Missouri, in the following words and figures, viz:

Call for a meeting of stockholders H. & St. J. R. R.

"The subscribers, owning more than one-fifth of the stock of the Hannibal & St. Joseph Railroad Company, hereby notify and call a meeting of the stockholders of said company, to be holden at the office of the treasurer of said corporation, in the city of Hannibal and State of Missouri, on the thirtieth day of May next, at ten o'clock, A. M., and they specify the object of said call to be as follows, viz: To see if the corporation will authorize the execution and carrying into effect, by appropriate means, of an agreement with the holders of its bonds, secured by its several mortgages, by which said bonds are, in certain events, to be exchanged for new bonds and preferred stock of said corporation, when leave therefor shall have been obtained, and meanwhile its equivalent, as nearly as may be, or for preferred stock or its equivalent only, upon the terms and conditions, and with the agreement set forth in the draft of an indenture between said corporation and William H. Swift, Sidney Bartlett, and Nathaniel Thayer, trustees, bearing date the first day of April, 1863, a copy of which, on the day of publication hereof, is to be deposited with the treasurer of said corporation.
Boston, April 24, 1863.

JOHN E. THAYER & BRO	185	sh's
N. THAYER	453	"
H. H. HUNNEWELL	481	"
DE LANNARY, ISELIN & CLARK	776	"
JOHN E. WILLIAMS	265	"
E. K. ALBURTIS	211	"
54 JULIUS DEPPERMAN, by E. K. ALBURTIS	141	sh's.
CHA'S GOULD	762	"

SAM'L W. COMSTOCK	204	"
A. C. RICHARDS, by ELISHA ALLEN, JR., ATT'Y	420	"
R. S. WATSON	508	"
H. HUNNEWELL, S. BARTLETT, } Trustees	9,953	"

And in accordance with the charter and by-laws of the Hannibal & St. Joseph Railroad Company, the stockholders of said company, assembled at the office of the treasurer thereof, on this thirtieth day of May, A. D. 1863, at 10 o'clock, a. m.

Proceedings.—Exhibit F of defendant's amended ans.

On motion, Joshua Gentry was elected chairman of the meeting. On motion, J. L. Lathrop was appointed clerk of the meeting. On motion, the draft of an agreement between The Hannibel & St. Joseph Railroad Company, and William H. Swift, Sidney Bartlett, and Nathaniel Thayer, was submitted to the meeting and read; which draft was in words and figures as follows, viz:

(See pages 10 to 22, of bill of complaint.)

On motion, J. T. K. Hayward was appointed judge and supervisor of the voting upon the resolutions submitted to the meeting, and being duly qualified, the stockholders, on motion, proceeded to vote upon the following resolution, viz:

Resolutions.

Resolved, That this corporation consents to and adopts the draft of an agreement between it and William H. Swift, Sidney Bartlett, and Nathaniel Thayer, trustees, bearing date the 1st day of April, 1863, a printed copy of which has been this day submitted to this meeting, and John W. Brooks, chairman of the board of directors of the corporation, is hereby authorized to execute said agreement in its
55 name and behalf, and affix its common seal thereto.

Resolved, That the said John W. Brooks, as chairman as aforesaid, and Robert S. Watson, treasurer of the fiscal agency of this corporation be, and they are hereby, authorized to sign, in behalf of the corporation, all bonds that may be issued in pursuance of said agreement, and to affix the corporate seal thereto, and that said R. S. Watson may cause his signature, to the several coupons or interest-warrants attached to said bonds, to be lithographed, and the same shall be deemed as against this corporation, to be the proper signature of said R. S. Watson, treasurer of its fiscal agency thereto.

Resolved, That the directors be authorized and requested to procure or adopt, in behalf of the corporation, such certificates in relation to the preferred stock, to be issued under said agreement, as may be necessary to carry the same into effect, and to cause the same to be executed in behalf of this corporation, in such manner as they may think best, and that they be further authorized to execute any other writings or agreements which shall be appropriate to carry said agreement into effect.

On motion, the polls were closed at 12 o'clock at noon, and the result announced as follows: The certified lists of stockholders show two hundred fifteen (215) holders of seventeen thousand one hundred and ninety-seven (17,197) shares registered upon the transfer-books of the company; and there were present, at this meeting, in person and by

proxy, one hundred and twenty-eight (128) stockholders, representing fourteen thousand three hundred and eleven (14,311) shares of stock, and all voted in favor of the foregoing resolutions, which are therefore adopted and passed. On motion, it was voted that this meeting does now adjourn.

JOSHUA GENTRY, *Chairman.*

JNO. L. LATHROP, *Clerk.*

56 HANNIBAL, MO., *June* 2, 1863.

I hereby certify that the above and foregoing is a true copy of the record of the meeting of the stockholders of the Hannibal & St. Joseph Railroad Cempany, held at Hannibal, April 30, 1863.

JNO. L. LATHROP, *Sec'y.*

Ex. G of def't's amended ans.

Exhibit G, of defendants' amended answer.

(See Exhibit B, of defendants' answer, pages 37 & 38 of this transcript.)

Ex. G of def'ts' amended ans.

Exhibit G of defendant's amended answer.

(See Exhibit C of defendant's answer, pages 38 & 39 of this transcript.)

And afterwards, at a regular stated term of the said circuit court, begun and held at the city of St. Louis, on the first Monday of April, A. D. 1871, the following further proceedings were had in this case on Saturday, April 8th, 1871, to wit:

Stipulation filed.

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, defendant. } In chancery.

This day come the parties, by their respective solicitors, and file a stipulation, signed by said solicitors in reference to the admission of certain allegations in complainant's bill.

And the stipulation filed as aforesaid is in the following words and figures, to wit:

57 *Stipulation.*

In the United States circuit court for Mo. In chancery.

BAILEY
vs.
HANN. & ST. J. R. R. CO.

The allegations in the complainant's bill respecting the ownership of the stock of the complainant, are admitted. It is also admitted that

the ownership continues to the hearing. This last admission is made only for the purposes of this trial.

THO'S T. GANTT, *P. D.*

And, afterwards, at said last-mentioned term of said circuit court the following further proceedings were had on this case on Friday, April 25, 1871, to wit:

Hearing of cause.

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, defendant. } In chancery.

This day come the parties, by their respective solicitors, the complainant, by Messrs. Glover and Shepley, and the defendant by Messrs. Gantt and Carr, and this cause having been this day brought on for hearing upon the bill, answer, replication, exhibits, and depositions, said cause was thereupon fully heard, argued, and submitted to the court upon the pleadings and proofs therein, and, the court not being fully advised of and concerning the premises, the said cause is by the court taken under advisement.

And, afterwards, at said last mentioned term of said circuit court, the following further proceedings were had in the case on Wednesday, April 26, 1871, to wit:

58 *Replication filed.*

JOHN BAILEY, COMPLAINANT,
ag'st
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, defendant. } In chancery.

This day comes the complainant, by his solicitors, Messrs. Glover and Shepley, and files his replication to the answer of defendant heretofore filed herein, and, on motion of said solicitors it is ordered that the same be entered of record nunc pro tunc as of date April 25, 1871, which is now accordingly done.

And the replication filed as aforesaid is in the following words and figures, to wit:

Replication.

In the circuit court of the United States for the districts of Missouri.

JOHN BAILEY
vs.
THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY.

And now comes the said complainant, and, for replication to the answer of defendant, the said complainant says that the several matters and things & averments in said complainant's bill herein set forth, are

true in fact as therein set forth, & they will maintain and prove the same; and that the several matters, averments, & things in the answer of defendants in denial or avoidance of the said complainant's bill are not true or just, & this they will maintain & prove, & the said complainant prays as in his original bill, &c.

GLOVER & SHEPLEY,
For Claimant.

And, afterwards, at the said last-mentioned term of said circuit court, the following further proceedings were had in the said case on Thursday, June 29, 1871, to wit:

59 JOHN BAILEY, COMPLAINANTS, *ag'st* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, DEFENDANTS. } In chancery.

This day come the parties, by their respective solicitors, the complainant by Mess. Glover and Shepley, and the defendant by Mess. Gantt and Carr, and this cause having been brought on for hearing at a former day of the present term of this court; and the same having been fully heard and argued and submitted to the court upon the pleadings and proofs therein, and the court being now fully advised in the premises:

Final decree.

It is ordered, & adjudged, and decreed that the bill of said complainant be, and the same is now hereby, dismissed, and that said complainant pay the costs of this suit, and that execution or a fee-bill be issued therefor.

Appeal allowed.

And, thereupon, the said complainant, by his said solicitors, prays an appeal in this cause from the decree rendered herein to the Supreme Court of the United States, which is allowed and said appeal now ordered.

Transcript ordered.

And, on motion of said solicitors for claimant, it is further ordered that a transcript of the record and proceedings in this cause be transmitted to the Supreme Court of the United States, in which transcript shall be inserted as the evidence read on the part of the complainant, all the exhibits to the bill, and all depositions taken on the part of said complainant; and as the evidence read on the part of the defendant, all exhibits to the amended answer, and all depositions taken on the part of the said defendant; and in said transcript shall also be inserted all agreements of counsel on file in said cause.

And, on the said 29th June, 1871, there was filed in the clerk's office of said court the following "agreement of counsel" in words and figures as follows, to wit:

60 *Agreement of counsel.*

Circuit court of the United States.

JOHN BAILEY
vs.
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY.

It is admitted that the indenture, Exhibit A to complainant's bill, was executed by the company and the trustees, immediately after the adoption of it at the stockholders' meeting of said company, in May, 1863.

JAMES CARR,
Sol' for Defendant.
GLOVER & SHEPLEY,
P'r Compl'ts.

And, afterwards, there was filed in the clerk's office of said court, on Saturday, July 8, 1871, the following bond of appeal by the complainant.

Appeal bond.

Know all men by these presents that we, John Bailey & W'm M. McPherson, are held and firmly bound unto the Hannibal & St. Joseph Railroad Company in the full and just sum of one thousand dollars to be paid to the said Hannibal & St. Joseph Railroad Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals, and dated this eighth day of July, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas lately, at the April term of the circuit court of the United States for the districts of Missouri, in a suit depending in said court between the said John Bailey as complainant, and The Hannibal and St. Joseph Railroad Company as defendant, judgment was rendered against the said complainant, and the said complainant, John
61 Bailey, having obtained an appeal to reverse the judgment in the aforesaid suit to the Supreme Court of the United States, to be holden at Washington the first Monday of December next:

Now, the condition of the above obligation is such, that if the said appellant, John Bailey, shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

JOHN BAILEY. [SEAL.]
W'M. M. MCPHERSON. [SEAL.]

Sealed and delivered in presence of—
JOSEPH GUTMAN, J'R, as to John Bailey.

Approved by—

SAMUEL TREAT, *Judge.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

On the 5th day of July, A. D. 1871, before me, personally came John Bailey, to me known to be the individual described in and who executed the within instrument, and acknowledged that he executed the same.

[SEAL.] JOSEPH GUTMAN,
United States Commissioner, S. D. N. Y.

EVIDENCE FOR COMPLAINANT.

Deposition of Edw'd T. Hornblower.

Deposition of Edward T. Hornblower, taken before John W. Hudson, a notary public in and for the county of Suffolk and State of Massachusetts, at the city of Boston, in said county and State, on the part of complainants:

62 I, Edward T. Hornblower, of Concord, Mass., aged 42 y'rs, on oath depose and say:

I have been a book-keeper since I have been in Boston, with Mr. Watson, in the office of the Hannibal and St. Joseph Railroad Company here. I have been here since Feb. 9, 1863. My duties have been the same as now all the time I have been here. I am in the office of the fiscal agent of the Hannibal and St. Joseph Railroad Company, in Boston. My duties are to attend to the clerical duties of the office here and to attend generally to whatever I am called upon to do. I was the only clerk for a long time, about five years after I commenced; and since that time I have been the leading clerk. I know the indenture of April 1st, 1863, providing for the exchange of bonds into preferred stock.

Qu. What was the amount of bonds of the defendants outstanding on the 1 April, 1863, contemplated by that indenture to be exchanged for preferred stock?

(Objected to.)

Ans. Of the land-bonds four millions seven hundred and seventy-nine thousand five hundred dollars; of the convertible bonds, *of the convertible bonds*, thirteen hundred and seventy thousand dollars; of the second-mortgage bonds, one million two hundred thousand dollars.

Qu. And what back interest?

(Objected to.)

Ans. I shall have to refresh my memory. Upon refreshing my memory I find there was three years' interest due on the land-bonds and unpaid April 1st, 1863, and also on the convertible bonds; and three and a half years' interest due and unpaid on the second-mortgage bonds. There was a mortgage due to the State of Missouri, and there might have been back interest due on that. The mortgage was for three million dollars.

63 Q. What arrearages of interest, if any, were due and unpaid on that debt on the 1st of April, 1863?

(Objected to.)

Ans. Interest for one year and nine months.

Q. Was there any, and if so, what floating debt in addition to the bonded debt of the defendants April 1st, 1863?

(Objected to.)

Ans. To the best of my recollection there was no floating debt.

Q. Are there in the defendant's office, in Boston, any copies of the indenture of April 1st, 1863?

Ans. There are, sir.

Q. Please produce a copy.

(Objected to.)

Ans. I produce a copy marked "Exhibit A 1," to be annexed to my deposition.

Q. How soon after April 1st, 1863, was the first share of preferred stock issued by the defendants in exchange for bonds mentioned in the indenture of April 1st, 1863?

(Objected to.)

Ans. There was no preferred stock issued before that, to my knowledge. There is not in this office any certificate-book of preferred stock prior to that date. The certificate-books of that stock are kept here and the stock is issued here in the office of the fiscal agent here.

Q. What amount of common (or unpreferred) stock of the defendants was outstanding April 1st, 1863?

(Objected to.)

Ans. As the books for that class of stock were kept at Hannibal, I have not the facts requisite for answering that question.

Q. What amount of preferred stock was issued by the defendants from June 18, 1863, to November 7, 1870?

(Objected to.)

Ans. Fifty thousand eight hundred and seventy-two $\frac{24}{100}$ shares, amounting at par to five million eighty-seven thousand and two hundred & twenty-four dollars.

Q. Of this amount, what was issued between June 29, 1870, and Nov. 7, 1870?

(Objected to.)

64 Ans. None, according to my best recollection.

Q. Please give a copy of the certificate of preferred stock issued June 18, 1863, and subsequently?

(Objected to.)

Ans. The company first issued a certificate in the form of the blank marked "Exhibit A 2," hereto annexed, and subsequently the certificate in the form of the blank marked "Exhibit A 3," hereto annexed. The last certificate in the form marked "Exhibit A 2," was issued March 15, 1864. The certificates in the form marked "Exhibit A 3" have been issued since.

Q. What moneys or funds had the defendants on hand April 1st, 1863, to pay the principal of the bonds mentioned in the indenture of April 1st, 1863, the three million debt to the State of Missouri, and the unpaid interest on those bonds and on that debt?

(Obj. to.)

Ans. To the best of my recollection they had no funds.

Q. Had the holders of the bonds mentioned in the indenture of April 1st, 1863, any security; and if so, what, for their bonds?

(Objected to.)

Ans. All the bonds were mortgaged bonds.

Q. Was there any dividend declared by the defendants, after April 1st, 1863, either upon the unpreferred or preferred stock? If so, state all the dividends so declared, and the terms and amounts thereof

(Objected to.)

Ans. The only dividend declared since April 1st, 1863, was declared last August. I should have said paid last August. It was declared June 29, 1870. The terms were, as appears by a vote of the board of

directors, announced in the printed circular hereto annexed, and marked "Exhibit A 4," dated June 29, 1870. The amounts paid were paid Aug. 15, 1870, and were as follows: On the preferred, three hundred and fifty-six thousand and forty-one dollars; on the unpreferred, one hundred & forty-five thousand three hundred and nine $\frac{50}{100}$ dollars.

The holders of preferred stock have received no other dividend
65 except the one paid Aug. 15, 1870.

Q. Had the defendants on hand June 29, 1870, net earnings of their road, any, and if so, what sum beyond that required to meet the dividends on that day declared, and made payable Aug. 15, 1870?

(Objected to.)

Ans. I cannot answer that question.

Q. Will the books of the fiscal agency enable you to answer it?

(Objected to.)

Ans. No, sir.

Q. Were there any, and what changes in the holders of preferred stock of the defendants, after the original issue of stock to the holders of the bonds mentioned in the indenture of April 1st, 1863?

(Objected to.)

Ans. There were transfers made by different parties.

Q. To what extent have the persons originally receiving preferred stock in exchange for bonds, transferred them?

(Objected to.)

Ans. To a considerable amount.

E. T. HORNBLOWER.

The exhibits annexed and referred to in the foregoing deposition are in the words and figures as follows, to wit:

Exhibit "A 1," dep. of E. T. Hornblower.

Exhibit "A 1," of E. T. Hornblower's deposition for complainant.

(See Exhibit "A," complainant's bill of complaint, pages 10 to 22, inclusive, of this transcript.)

Exhibit "A 2," of same dep.

Exhibit "A 2," of E. T. Hornblower's deposition for complainant.

(See Exhibit "B," of defendant's answer, pages 37 & 38 of this transcript.)

Exhibit "A 3," of same deposition.

Exhibit "A 3," of E. T. Hornblower's deposition for complainant.

66 (See Exhibit "C," of defendant's answer, pages 38 & 39 of this transcript.)

Exhibit "A 4," of same deposition.

Exhibit "A 4," of deposition E. T. Hornblower for complainant.

HANNIBAL & ST. JOSEPH R. R. COMPANY.

Circular.

BOSTON, *June* 29, 1870.

At a meeting of the board of directors of the Hannibal & St. Joseph Railroad Company held this day, on motion of N. Thayer, seconded by W'm H. Neilson,

Voted: That whereas the earnings of the road for six months, ending July 1st, 1870, are sufficient for the declaration of a dividend, all prior earnings having been applied to the improvement, maintenance, and working of the road:

Voted: That there be distributed to the holders of preferred stock of record July 31st, 1870, 7 per cent. upon the amount of said stock, payable August 15th, next, being the amount of preference to which they are entitled for the year 1870, as per the provisions of the indenture of April 1st, 1863, and that there be paid to the holders of the common stock of record of July 31st, 1870, a dividend of 3½ per cent. payable August 15th, next, for the six months ending July 1st, 1870; and that the earnings of the road for the remaining six months be first applied to pay the further dividend of 3½ per cent. on said common stock, and that the books be closed from the 1st to the 16th day of August, 1870, inclusive.

By order of the board of directors.

R. S. WATSON, *Treasurer.*

67 *Dep. of Thomas L. Taylor on part of complainant.*

Deposition of Thomas L. Taylor, taken before W. Q. Riddle, a notary public within and for the city, county, and State of New York, at the city of New York in said county and State, on the part of complainant.

THOMAS L. TAYLOR, of lawful age, being duly examined, cautioned, and sworn, deposes and says:

Question 1st. Do you know the complainant, John Bailey, and his residence, and if so, how long have you known said John Bailey and his residence?

Answer. I do know both Mr. Bailey and his residence. I have known Mr. Bailey for the past eight years, and his present residence for the past three years.

2d question. During the past three years, what changes, if any, has Mr. Bailey made in his residence?

Answer. None.

3d question. Where, during that time, has been and now is the complainant's residence?

Answer. Until within a few days past his residence has been in the township of Hackensack, in the county of Bergen, in the State of New Jersey. By the recent division of that township into three townships, Mr. Bailey's residence falls in one of the new divisions called Englewood.

4th question. Where has been your own residence the past year?

Answer. Within a very short distance of Mr. Bailey, in the same township.

THO'S L. TAYLOR.

68 *Dep. of N. Thayer on part of complainant.*

Deposition of Nathaniel Thayer, taken before Charles F. Walcott, a notary public in and for the county of Suffolk, State of Massachusetts, at the city of Boston, in said county and State, on the part of the complainant.

NATHANIEL THAYER, of lawful age, on oath deposes as follows:

Int. 1. What official relation have you with the defendants; when did that relation commence; and how continuously has it remained?

Ans. I am a director in the company; it commenced prior to 1857, and continued to this time.

Int. 2. Do you hold the position of trustee under any mortgage-trusts of the company? and if so, in what mortgages?

(Obj. to.)

Ans. In the mortgage of the land-bonds, I am a trustee; and, also, in the eight per cent. convertible mortgage-bonds; the land-bond mortgage to which I refer is of date April 1st, 1863, which took the place of the land-mortgage of April 1st, 1856.

Int. 3. What is the date of the eight per cent. convertible mortgage, and what amount did that secure?

Ans. March 1st, 1870, for four millions of dollars, all of which has not been issued.

Int. 4. Are you not one of the trustees, also, under the indenture of April 1st, 1863?

Ans. I am, sir.

Int. 5. Mr. Thayer, were you not examined as a witness in this action on the part of the defendants in Boston, on or about April 3d or 4th, instant, and your testimony given before John W. Hudson, as notary?

Ans. I was.

Int. 6. In that examination, did you not speak of a certain circular dated October 15, 1862?

(Objected to.)

Ans. I did, sir.

Int. 7. Did you not also in that examination speak of an agree-
69 ment of certain bondholders of defendants, which you had some agency in devising?

(Obj.)

Ans. I did.

Int. 8. Will you state where that original agreement now is?

Ans. I believe it was sent to Saint Louis by Mr. Hudson, the notary.

Int. 9. Will you be good enough to search the office of the defendants here in Boston, and ascertain whether or not it be here; if here, to produce the same?

(Obj.)

Ans. I will produce a part of the originals. I know of no other way to answer the question, as I have already answered that Mr. Hudson sent to Saint Louis part of the originals and copies. I have, this morning, made careful search, and produce all the papers which I find. I here annex, as part of my answer, a copy of the entire heading of the original of that agreement.

(The paper here produced is hereto annexed, marked "A, C. F. W.")

Int. 10. Is that copy, "A, C. F. W.," the entire agreement spoken of by you?

(Obj.)

Ans. It is, sir.

Int. 11. Who drew it, and when was it drawn?

(Obj.)

Ans. I think it was drawn by Mr. Brooks. I can't state the precise date, but subsequent to October 15, 1862.

Int. 12. Can you state the month in which it was drawn?

(Obj.)

Ans. I think, October, 1862, but I will not swear that it was.

Int. 13. Did you personally see any one sign that agreement; if so, state fully who you saw sign?

(Obj.)

Ans. I saw Mr. Ignatius Sargent, Charles Sprague, and a great many others sign it.

Int. 14. State, to the best of your ability, all the names of the persons whom you personally saw sign it, besides those named.

(Obj.)

70 Ans. There is the name of Mr. Perkins. I know that it is his signature, but I can't swear that I saw him sign it, or the other parties. After the lapse of ten years, I can't swear whether I saw them sign or not, but I know the signatures.

(Mr. Sherwood objects to last clause as irresponsive.)

Int. 15. Have you before you the names of all the persons signing that agreement?

(Obj.)

Ans. No, sir; I have not.

Int. 16. Where are the signatures of those whose names are not on papers in the Boston office of defendants?

(Obj.)

Ans. They are supposed by me to be either here or at Saint Louis.

Int. 17. Have you before you now all the original names in the Boston office of defendants attached to that agreement?

(Obj.)

Ans. All the parties who did not convert their bonds on the spot in conformity to that agreement. If they brought in their bonds and exchanged them, there was no occasion for them to sign.

Int. 18. Then, I understand you, that you have before you now all the names originally signed to the agreement at present in the Boston office?

(Obj.)

Ans. So far as they have been handed to me by the clerks this morning—one of the clerks in the office.

Int. 19. Were they so handed to you in answer to your request to have them all in order to meet question 9?

Ans. Yes, sir.

Int. 20. Are there any of those signatures now before you of gentlemen whom you neither saw write them or of gentlemen with whose handwriting you are not familiar?

(Obj.)

Ans. Quite probably. Part of these were signed in England by persons whom I never saw.

71 Int. 21. How large a proportion of the signatures before you were by persons whom you did not see write them, and of persons with whose handwriting you are not familiar?

(Obj.)

Ans. I cannot say, sir.

Int. 22. Please inspect them, and give me some idea of what proportion.

(Obj.)

Ans. A small proportion, to the best of my recollection, at this time.

Int. 23. Did you personally procure the signatures of any; if so, how many, or about how many, and where were they procured by you?

(Obj.)

Ans. A large proportion, either by personal application or by correspondence in this country and in Europe.

Int. 24. Of those procured by personal application on your part, where were they so procured?

(Obj.)

Ans. In Boston, New York, and other places.

Int. 25. In what months and in what years were these personal applications made by you?

(Obj.)

Ans. In the fall of '62 and early in '63; the last signature, I believe, being made some time in February, 1863.

Int. 26. What became of the agreement itself? I mean the papers and signatures, after February, 1863. Where were they put?

(Obje.)

Ans. Kept in this office. Either in this office, or my office, I can't say at which; it's so long ago.

Int. 27. When, after February, 1863, did you next see these papers?

(Obj.)

Ans. I cannot fix any date when I saw them until last summer or autumn, when they were found. I saw them, undoubtedly, from time to time.

Int. 28. Do you remember distinctly having seen them between February, 1863, and last summer or autumn, when they were found?

(Obj.)

72 Ans. I have no doubt I did.

Int. 29. When, and where?

(Obj.)

Ans. In this office, or my office. As I've already said, I can't fix the precise date.

Int. 30. What month in 1870 were the papers found; and where?

(Obj.)

Ans. Soon after Mr. Bailey's suit, in a trunk, with other papers belonging to the company, in the company's safe here.

Int. 31. Was it before the hearing on a motion for an injunction in this suit at Saint Louis?

(Obj.)

Ans. After the hearing at Saint Louis, in this case, before Judge Treat.

Int. 32. Do you know whether any of the holders of the bonds mentioned in the indenture of April 1st, 1868, did not, for any reason, sign the agreement of which you have spoken?

(Obj.)

Ans. As I have already said, they either signed the agreement or surrendered the bonds at the time when the new bonds or preferred stock were issued.

Int. 33. Do you mean to state that every holder of the bonds provided to be exchanged for new bonds and preferred stock came in prior to March, 1863, and either actually surrendered their bonds, or signed the agreement to surrender them? If so, state how far your answer is from personal knowledge, and how far from what you learn from others.

(Obj., for form and substance.)

Ans. A few of them were exchanged at a later date. Part of that I state from my own knowledge, and part from the records I now find in the office.

Int. 34. Please state what those later dates are.

(Obj.)

Ans. A very few of them were exchanged a year and a half to two years ago.

73 Int. 35. Were any of the bonds you speak of as being exchanged up to as late as one and a half to two years ago, of the description mentioned in the indenture of April 1st, 1863?

(Obj., form and substance.)

Ans. No, sir; they were of the old land-bonds.

Int. 36. Of what date were those old land-bonds of which you have spoken in your last answer?

(Obj.)

Ans. 1st day of April, 1856.

Int. 37. Were not others of the bonds of that date and character, exchanged with preferred stock between May, 1863, and up to within one and a half to two years ago?

(Obj., form and substance.)

Ans. Quite probably; I have not those dates before me.

Int. 38. Can you ascertain by the books of this office whether any were so exchanged?

(Obj., form and substance.)

Ans. I cannot without a long time. They are scattered along, but only the numbers of the bonds are put down, but not dates.

Int. 39. Did you not state, in the examination taken before Mr. Hudson, spoken of, that the directors called a meeting of the stockholders of defendants to be held at Hannibal, May 30, 1863? If so, please state the date of that directors' meeting, and give a copy of the resolution adopted.

(Obj., for form and substance.)

Ans. I probably did. I've forgotten whether I was asked that question. I probably did if I was asked, as that was the fact, or rather such a meeting was called by more than one-fifth of the stockholders, according to the provisions of the charter—I signing the call. They was no call by the directors, and no meeting of directors. I find no record of any meeting of directors, and no resolution adopted.

Int. 40. Please state the date of the call for that stockholders' meeting, of which you have spoken, and which you signed?

(Obj.)

Ans. April 24, 1863, as I find by the company's records.

74 Int. 41. Did you attend that stockholders' meeting of May 30, 1863?

(Obj.)

Ans. No, sir; I did not; I sent a proxy.

Int. 42. Did you attend a directors' meeting held June 29, 1870, which declared a dividend, as director?

(Obj.)

Ans. I did.

Int. 43. Were there any other funds of the defendants on hand at that time, being the net earnings of the road over and above the amount necessary to pay the dividend, then declared, and payable August 15, 1870?

(Obj., form and substance.)

Ans. I have not those figures before me.

Int. 44. Upon whose motion was that declaration of dividend?

(Obj.)

Ans. Myself, seconded by William H. Neilson.

Int. 45. What knowledge, at the time of making that motion, had you as to the amount of net earnings on hand for the dividend so declared?

(Obj.)

Ans. Statements made by officers of the company.

Int. 46. From those statements, what was the amount?

(Obj.)

Ans. As I've said before, I haven't those statements before me.

Int. 47. Who were the officers making those statements?
(Obj.)
Ans. The treasurer and superintendent.
Int. 48. When were those statemeents rendered, and what are they called?
(Obj.)
Ans. They were before the directors, at their meeting on the 29th of June, 1870, and are called the earnings of the road for the six months, ending July 1st, 1870.
Int. 49. Where are those statements now?
(Obj.)
Ans. With Mr. Lathrop or with Mr. Nettleton, at Hannibal. A copy was sent here at that time of the monthly earnings of the road for six months, estimating June.
Int. 50. Was it upon those copies so sent from Hannibal to the Boston office, that the declaration of dividend was made June 29, 1870?
75 (Obj., form and substance.)
Ans. It was, sir.
Int. 51. Where are those copies?
(Obj.)
Ans. I will annex copies to this deposition, as of record in this office. The original statements from Hannibal are in this office, and I annex copies of those.
(Copies here produced, by the witness, are annexed, marked "B, C. F. W.")
Int. 52. Was there any scrip, to your knownedge, of the kind mentioned in the papers of "A, C. F. W.," ever issued by the defendants?
(Obj.)
Ans. There was; and which was taken up and preferred stock issued after the act of the Missouri legislature was obtained.
Int. 53. Please annex what you call scrip which was issued before the authority of the legislature was obtained?
(Obj.)
Ans. I produce and annex it, marked Exhibit "C, C. F. W."
Int. 54. Do you know of any other scrip except that in the form Exhibit "C, C. F. W."
Ans. No, sir.

And the exhibits referred to in the foregoing deposition of N. Thayer are, respectively, in the following words and figures, to wit:

Ex. "A, C. F. W." of N. Thayer's deposition.

Exhibit "A, C. F. W." of Nathaniel Thayer's deposition.

We, the subscribers, owners of bonds issued by the Hannibal & St. Joseph Railroad Company, of the kinds and amounts set against our names, respectively, hereby agree to surrender the same and receive in exchange therefor new bonds and preferred stock, in accordance with the provisions of the plan for extricating the company from its
76 present difficulties, and improving its securities, dated October 15, 1862, and hereunto annexed.
Provided that our bonds shall not, by their surrender, be deemed to have been paid, cancelled, or extinguished, but shall be held by trustees until this arrangment be completed or terminated; to the end that, if

from any cause it shall be found by the corporation that it cannot be effectively carried out, no advantage shall be gained by those who do not exchange, but, by a re-exchange, all may be returned to their original position.

And further, as no authority exists for issuing preferred stock, until such authority be obtained there be issued, in lieu thereof, scrip, in one hundred dollar shares, which shall be registered and transferable in the same manner as stock, and entitled to all the dividend rights of such preferred stock, for which it may be exchanged when the requisite legislation shall be obtained.

Names.	Land-bonds.	Convertible bonds.	Second-mortgage bonds.
	Amount.	Amount.	Amount.

Ex. "B, C. T. W." of N. Thayer's deposition.

Exhibit "B, C. F. W." of N. Thayer's deposition.

Earnings of Hann'b. & St. Jo. R. R. Co., for 6 months, ending June 30, 1870.

January	211,207 00
February	240,653 65
March	324,252 95
April	324,434 80
May	289,977 83
June	278,808 83
	$1,669,335 06

Ex. "C, C. T. W." of N. Thayer's deposition.

Exhibit "C, C. T. W." of N. Thayer's deposition.

(See Exhibit "B.," of defendant's answer, on page 37 of this transcript.)

77 EVIDENCE ON THE PART OF THE DEFENDANT.

Deposition of Jno. L. Lathrop, on part of def't.

Deposition of John L. Lathrop, taken before H. B. Leach, a notary public in and for the county of Marion, and State of Missouri, at the city of Hannibal, in said county and State, on the part of defendant.

JNO. L. LATHROP, of lawful age, being duly examined, cautioned, and sworn, deposes and says:

1st. State your name, age, residence, and occupation.

Answer. My name is John L. Lathrop; age, 51 years; residence, Hannibal, Marion County, Missouri; occupation, secretary & treasurer of the Hannibal and St. Joseph Railroad Company.

2nd interrogatory. Were you present at a meeting of the stockholders

of the Hannibal & St. Joseph Railroad Company, at Hannibal, on May 30, A. D. 1863; if yea, in what capacity did you act thereat?

Answer. I was present at the meeting of stockholders of the Hannibal and St. Joseph Railroad Company on the 30th day of May, 1863. I was there as a stockholder and I acted in the capacity of clerk of the meeting.

3d interrogatory. State, if you can, the names of the several stockholders who attended that meeting in person, and the number of shares held by each?

Answer. J. T. K. Hayward, a stockholder, held 1 share; Joshua A. Gentry, a stockholder, held 17 shares; John B. Helm, a stockholder, held 3 shares; John L. Lathrop, a stockholder, held 33 shares.

4th interrogatory. State the names ot those who were represented at that meeting by proxy, the number of shares voted by each proxy, and the names of the persons, in each case, who acted as proxy for the absent stockholders.

Answer. S. C. Beemis, 1 share; John P. Joy, 1 share; Charles
78 Joy, 1 share; Sarah Joy, 1 share; Hannah Joy, 1 share; Sylvester Joy, 1 share; R. P. Joy, 1 share; James P. Joy, 1 share; Mary Pierce, 1 share; John Pierce, 1 share; P. Draper, administrator, 37 shares; making in all 47 shares, whose proxies were held and presented by H. V. P. Draper. C. M. Carryl, 170 shares; C. M. Carryl, executrix, 282 shares; J. E. Williams, 266 shares; W. H. Swift, 1 share; Charles Gould, 762 shares; DeLanney, Iselin & Clark, 776 shares; E. K. Alburtis, 211 shares; Julius Depperman, 141 shares; S. W. Comstock, 204 shares; E. S. Gould, 6 shares; in all 2,719 shares; whose proxies were held and presented by J. B. Helm. C. F. Forbes, 1 share; M. P. Forbes, 1 share; E. L. Baker, trustee for B. Wood, 1 share; E. L. Anthony, 1 share; H. Anthony, 1 share; P. Anthony, 1 share; S. A. Baker, 1 share; O. P. Brightman, 1 share; J. R. Baker, 1 share; S. P. Burt, 1 share; Abbey L. Chase, 1 share; Apphia Chase, 1 share; G. H. Foster, 1 share; & A. G. Pierce, 1 share; total 12 shares; for which E. L. Baker was trustee; E. L. Baker, 2 shares; the first following 8 shares for which R. S. Watson was trustee: L. McDermott, 1 share; J. L. Watson, 1 share; R. C. Watson, 1 share; A. H. Watson, 1 share; A. R. Watson, 1 share; S. H. Watson, 1 share; Theo. Watson, 1 share; F. S. Watson, 1 share; M. H. Watson, 1 share; M. F. Watson, 1 share. J. W. Brooks was trustee for the first following 13 shares: for S. W. Wiley, one share; William Wiley, 1 share; John Callahan, 1 share; Mary Barber, 1 share; Henry Brooks, 1 share; E. C. Brooks, 1 share W. D. Brooks, 1 share; C. L. Brooks, 1 share; J. H. Brooks, 1 share; S. W. Brooks, 1 share; F. Dean, 1 share; H. B. Jonson, 1 share, James Paul, ; in all 13 shares; J. W. Brooks, 3 shares. J. N. Dennison was trustee for the first four following shares: C. D. Dennison, 1 share; C. A. Dennison, 1 share; M. F. Dennison, 1 share; J. H. Dennison, 1 share; in all 4 shares; J. N. Dennison, 1 share. Isaac Livermore, was trustee for the first five following shares, to wit: C. F. Livermore, 1 share; E. S. Leland, 1 share; E. Livermore, 1 share; W. A. Burlingame, 1 share; E. L. Burlingame, 1 share; in all 5 shares, Isaac Livermore, 1 share. R. B. Forbes was trustee for the first five
79 following shares, to wit: George Smith, 1 share; Edith Forbes, 1 share; J. Murray Forbes, 1 share; R. G. Forbes, 1 share; P. Dumaresg, 1 share; in all five shares; R. B. Forbes, 2 shares. The above 60 shares whose proxies were held and presented by B. N. Crump, who voted the aforesaid 60 shares. E. J. Hale, trustee for the first fifteen shares following, to wit: Joseph Sewell, 1 share; Alfred Trigg,

1 share; E. F. Hale, 1 share; G. W. Lloyd, 1 share; W. A. Hale, 1 share; Mary Hale, 1 share; E. C. Hale, 1 share; F. Gardiner, 1 share; L. A. Hale, 1 share; J. N. Hale, jr., 1 share; Edward Hale, 1 share; W. R. Emmerson, 1 share; A. H. Borden, 1 share; G. T. Brown, 1 share; H. Abbott, 1 share; total, 15 shares. E. J. Hale, 1 share; J. M. Forbes, 1 share; J. F. Tuckerman, 1 share; J. E. Thayer & Brother, 185 shares; F. E. Whiteing, 1 share; G. B. Upton, 1 share; G. B. Upton, jr., 1 share; N. Thayer, 453 shares; J. T. Skinner, 1 share; J. H. Peabody, 1 share; R. M. Pratt, 1 share; H. P. Kidder, 1 share; H. H. Hunnewell, 481 shares; R. B. Forbes, jr., 1 share; S. S. Forbes, 1 share; John Duff & Co., 293 shares; Edmund Chase, 1 share; W. O. Comstock, 1 share; F. T. Bush, 1 share; Peter Butler, 5 shares; Alex. Beal, trustee for Sarah Beal, 1 share; Alexander Beal, 1 share; William Boot, 1 share; S. Bartlett, 2 shares; S. Bartlett, jr., 1 share; total 1,454 shares, whose proxies were held and presented by B. N. Crump, who voted the aforesaid 1,454 shares; Joshua Gentry, assignee of F. Liday, 1 share; W. P. Howard, 1 share held and presented by J. P. Richards. James Glasscock, 12 shares; John Patee, 10 shares; J. M. Forbes, S. Bartlett, & H. H. Hunnewell, trustees, 9,952 shares, total, 9,974 shares, whose proxies were held and presented by John L. Lathrop.

5th interrogatory. State the number and composition of the board of directors of the Hannibal & St. Joseph Railroad Company, on the 15th day of October, 1862; on the 24th day of November, 1862; on the 1st day of April, 1863; on the 30th day of May 1863; on the 26th day of June, 1863.

Answer. The number of the board of directors on the 15th day
80 of October, 1862, were 9 directors, as follows, to wit: J. W. Brooks, N. Thayer, S. Bartlett, H. H. Hunnewell, H. P. Kidder, William Boote, Joshua Gentry, James Craig, and J. T. K. Hayward. The number of the board of directors on the 24th day of November, 1862, was 9, composed as follows: Joshua Gentry, J. W. Brooks, Sidney Bartlett, N. Thayer, H. H. Hunnewell, W'm Boote, H. P. Kidder, J. T. R. Hayward, and John L. Lathrop. The number of board of directors on the 1st day of April 1863, was 9, composed as follows: Joshua Gentry J. W. Brooks, Sidney Bartlett, N. Thayer, H. H. Hunnewell, W'm Boote, Peter Butler, J. T. K. Hayward, and John L. Lathrop. The number and composition of the directors on the 30th day of May, 1863, were the same as on the first day of April, 1863; and the number and composition of the directors on the 26th day of June, 1863, were the same as on the first day of April, 1863.

JOHN L. LATHROP.

Dep. of N. Thayer on the part of def't.

Deposition of Nathaniel Thayer, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of the defendant.

I, NATHANIEL THAYER, of Boston, Massachusetts, aged 62 years, depose and say:

I was a director of the Hannibal & St. Joseph R. Road Company on the fifteenth of October, A. D. 1862, and had been for several years before that, and I have continued to be director ever since. At a meeting of the directors of said company held on said fifteenth day of Octo-

ber, a plan was laid before the board for extricating the road from its present difficulties and improving its securities, and adopted by the directors, by their vote, to be submitted to the bondholders (a
81 copy of which plan and vote the witness produced, and the same is hereto annexed and marked "B."

(Mr. Watson, the clerk of the board, having been called away by sickness in his family, Mr. Lathrop, counsel for the plaintiff, admits that said papers marked "B" are copies of the record of the clerk.—JOHN W. HUDSON, *Notary Public.*)

Immediately after the adoption of that plan by vote of the directors, I was intrusted with the duty of procuring the assent of the bondholders to the plan. I was at that time a considerable stockholder and a large bondholder of all classes of the securities. I was a large stockholder as well as bondholder. There was an agreement drawn under my supervision to be signed by the bondholders, and this is a printed copy of it, attached to which are the signatures of bondholders. This is one of the original papers presented to the bondholders.

(The paper produced by the witness is marked "C," and attached to it are the signatures of bondholders, and a copy of the plan above referred to.—JOHN W. HUDSON, *Notary Public.*)

A copy of that agreement to be signed by the bondholders, with the plan annexed, was sent to all the bondholders who could be found. Afterwards, on the 24th day of November, 1862, a vote was adopted by the board of directors to carry out the plan presented by the committee, as shown by the vote, a copy of which I here produce.

(The paper here produced is marked "D" and annexed hereto. In the absence of Mr. Watson, clerk of the board, Mr. Lathrop, counsel for the plaintiff, agress that the paper marked "D" is a copy of the clerk's record.—JOHN W. HUDSON, *Notary Public.*)

Afterwards, on the 13th day of December, I received a letter of instruction from that committee, a copy of which I here produce.

(The paper here produced is marked "E" to be annexed hereto. Mr. Lathrop, counsel for the plaintiff, agrees that the original deed
82 need not be annexed.—JOHN HUDSON, *Notary Public.*)

By my own personal knowledge, and by means of the agency referred to in said letter of instructions, I found out the residence of nearly all, and finally of all the bondholders. Finally the agreement and plan reached every one of them, and every dollar of the securities was converted in accordance with the plan. The signatures on the paper marked "C," which purport to be original signatures, are such. As to those signatures purporting to be signed by me or my firm, in behalf of the parties whose names are signed, I was duly authorized to sign each of them. As to the signatures on said paper marked "signed," they were mostly copied from original signatures on duplicates of the agreement, which signatures in the originals are here produced.

(Mr. Lathrop, counsel for the plaintiff, here waived the annexing of the original agreements last produced, and signed bondholders.—JOHN W. HUDSON, *Notary Public.*)

As to the rest of the signatures on the paper marked "C" which are marked "signed," they are the names of bondholders who left their bonds with me or at the office of the company to be exchanged, in accordance with the plan, without any signing of the agreement. The assent of all the bondholders was obtained about the 20th of February, 1863. There was a draft of an indenture bearing date April 1st, 1863, prepared by Mr. Bartlett, pursuant to the note of Nov. 24, 1862, which

note is contained in the paper marked "D." This paper now produced is a printed copy of that plan.

(The paper produced is marked "T" to be annexed.—JOHN W. HUDSON, *Notary Public.*)

This indenture was afterwards duly executed by the parties named in it. Before it was executed, it was examined by Mr.
83 Brooks, chairman of the board of directors, and by each member of the committee. It was understood by me and by the committee that this indenture was carrying out the plan and circular of October 15, 1862, without variation. The committee had no further authority than to carry out the intentions of that plan and circular. I was one of the subscribers to a call for a meeting of the stockholders of the Hannibal & St. Joseph Railroad Company, held in pursuance of said call, on the 30th day of May, 1863, at Hannibal, Missouri, a copy of which call, together with the record of the proceedings thereupon, duly certified by J. L. Lathrop, secretary of the meeting, I hereto annex marked "G."

(Mr. Lathrop, counsel for the plaintiff agrees that the paper produced is a copy of the call and of the proceedings of the meeting.—JOHN W. HUDSON, *Notary Public.*)

At the time that I signed that call I represented about seven hundred shares of the stock, and thirteen hundred and sixty-five thousand dollars of the different classes of the bonds. I gave my proxies to vote at that meeting at the time that I signed the call; and when I gave my proxies to vote at the meeting, I understood that the indenture of April 1st, 1863, (of which I have testified) carried out the intentions of the plan and circular. The resolutions passed at said meeting of May 30, 1863, were drafted here by the committee, under my inspection, and were sent out to Missouri by the committee to be adopted. When these resolutions were drafted in Boston, and sent out, it was understood by the committee that the indenture of April 1st, carried out the intentions of the plan and circular. A form of preferred certificate and obligation was the subject of a vote of the directors of said company, and a
84 copy of the clerk's record of their said vote, with the preferred certificate and obligation attached, is here produced.

(The paper produced is marked "H." Mr. Lathrop, counsel for the plaintiff, agrees that the paper "H" and the form of preferred certificate, &c., attached, are copies of the clerk's record.—JOHN W. HUDSON, *Notary Public.*)

After the passage of the act of the Missouri legislature authorizing the issue of preferred stock, the directors adopted a certificate of preferred stock, and this paper is one of the certificates prepared for use, but cancelled.

(The paper here produced is marked "I.") Mr. Lathrop, counsel for the plaintiff, agrees that this is one of the certificates as stated by the witness.—JOHN W. HUDSON, *Notary Public.*)

All the bonds were exchanged as I have stated. All the parties who exchanged them received from the corporation, as being in conformity to its agreement with them, made as before stated, a copy of the form attached to the paper marked "H," duly executed by the company; and afterwards these were all duly exchanged for the certificates in the form marked "I," duly executed by the company. No other form or agreement, obligation, or certificate was used. I exchanged my own bonds, those that I represented, and received the same forms of agreement and certificate, duly executed by the company. In doing this, I understood that those certificates carried out the plan and circular without any change.

So far as I know, none of the other bondholders had any other view of it. I never heard any doubts expressed about it.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except to the paper marked "T" and the evidence as to its execution, (which are admitted) both for form and substance; not, however, withdrawing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

85 Cross-examined by Thornton K. Lathrop, esq., counsel for the plaintiff. His cross-examination is made de bene.

The financial condition of the company, as appeared by its books, was correctly set forth in the circular attached to the paper marked "B." From the time of the adoption of that plan down to the first of January, 1870, no dividend was made either upon the common or the preferred stock of the road. The printed paper, marked "K," is a copy of a circular issued by order of the directors, June 29, 1870. It states correctly the votes passed by the directors on said 29th day of June.

(The paper referred to as the printed paper marked "K" is hereto annexed and identified.—JOHN W. HUDSON, *Notary Public.*

I think the first dividend ever declared on the preferred stock was then declared. No other dividend has since been declared. At the time that dividend was declared on the preferred stock, they company had on hand net earnings beyond the amount of that dividend, as shown by the books. They went right on and declared a dividend of three & one half per cent. on the common stock. They paid that dividend. Dividends were paid in conformity with the notes set forth in the paper marked "K." No dividend has been paid on the common stock since Aug. 15, 1870. There has been no appropriation of earnings to pay dividends on the common stock, since Aug. 15, 1870, on account of the injunction.

N. THAYER.

Dep. of John W. Brooks on the part of def't.

Deposition of John W. Brooks, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of defendant.

86 I, JOHN W. BROOKS, of Milton, Massachusetts, aged 51 years, depose and say:

I was a director and chairman of the board of directors of the Hannibal & St. Joseph Railroad Company, in November, 1862, and had been for several years previous. I continued to be a director up to the year 1870. I am not now an officer of the corporation and have no interest in either its bonds or stock. I drew the plan for extricating the company from its present difficulties and for improving its securities, a copy of which is attached to paper marked "B" attached to the deposition of Nathaniel Thayer. I presented the plan at a meeting of the directors of the company, held October 15, 1862, and voted for it when it was adopted, as shown by the copy of the record marked "B" and annexed to said Thayer's deposition. The vote was unanimous. The duty of getting the consent of the bondholders to the adoption of that plan was confided to Mr. Thayer. The indenture, a copy of which,

marked "F," is annexed to said deposition of Thayer, was drawn by Mr. Bartlett. The object of it was entirely to carry out the plan and circular. I understood the indenture to carry out the plan. I can't remember whether I studied it over or not, but the intention was to carry out the plan. After I had drawn the plan, I drew the agreement to be signed by the bondholders. Then there was an interim to see whether the bondholders would sign this agreement. Said agreement is marked "C," and attached to said deposition of Thayer. The indenture at that time had not been drawn at all. After it was ascertained by the signatures of the bondholders that they would agree to it, then the plan was submitted to Mr. Bartlett to draw an indenture in pursuance of it. I was present at the meeting of the board of directors on the 26th of June, 1863. I drew the last part of the preferred certificate and obligation attached to paper marked "H," annexed to
87 said deposition of Thayer, from the words "The Hannibal and St. Joseph Railroad Company hereby certifies" to the end of the paper. In drafting that I understood that I was carrying out the plan and circular. I had never heard of but two kinds of preferred stock, one in which the preference was to be cumulative, and the other in which it was to be not cumulative. The adoption of the non-cumulative plan was the intention. The form of the preferred certificate and obligation was examined by the other directors, and adopted by them with the same understanding, so far as I know. The form of the certificate of preferred stock was adopted by the directors in pursuance of the same plan. I drew the certificate part of that (I refer to the paper marked "I" annexed to said deposition of Thayer.) The certificate part was adopted from the other by leaving out a clause so as to leave it an absolute certificate instead of an agreement for a certificate. I understood and intended that it should be in precise conformity to the provisions of the preferred certificate and obligation. All the bonds were exchanged. All the parties who had agreed to exchange their bonds, accepted either the first form, duly executed, and afterwards the second duly executed, or else the second without having had the first issued to them. I have an impression that some of them did not get their bonds in until we were ready to issue the absolute certificate of preferred stock. I never heard any suggestion until about the time of the institution of this suit, that the form of certificates used was not in conformity with the plan and circular, and the bondholders' agreements. When I did hear the suggestion, I understood it came from Mr. Bailey.

J. W. BROOKS.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except the paper marked "F" and the evidence as to its execution, both for form and substance; not, however, withdraw-
88 ing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

No cross-examination.

Dep. of H. H. Hunnewell on the part of def't.

Deposition of H. Hollis Hunnewell, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of defendant.

I, H. HOLLIS HUNNEWELL, of Needham, Massachusetts, aged 60 years, depose and say:

I was, in November, 1862, a director of the Hannibal and St. Joseph Railroad Company, and had been so for some years previous, and I am so now. I was present at the meeting of the directors, Oct. 15, 1862, and voted for the plan (presented by Mr. Brooks) referred to and attached to paper marked "B" in the deposition of Nathaniel Thayer. The work of getting the assent of the bondholders to that plan was intrusted by the directors to a committee, consisting of Mr. Bartlett, Mr. Thayer, and myself; and by that committee was confided to Mr. Thayer. An agreement was prepared, with the circular annexed, and sent to all the bondholders. This agreement was in the form shown on paper marked "C" attached to said deposition of Thayer. After the assent of the share-holders was ascertained, a form of indenture was prepared, a copy of which, marked "F," is attached to said deposition of Thayer. I supposed that indenture carried out the plan. I knew it was intended to carry out the plan strictly, without change. I was one of the persons who signed the call for a meeting of stockholders,
89 as shown by paper marked "G" attached to the said deposition of Thayer. I held at that time in my own right four hundred and eighty-one shares of the stock: as trustee with others, nine thousand nine hundred and fifty-three shares of stock; and of the various classes of bonds in the aggregate, five hundred and twenty-three thousand dollars. I gave proxies to vote upon the above shares at said corporate meeting. The votes passed at that meeting were drawn in Boston and sent out to Missouri for adoption. My intention was, in giving those proxies and in assenting to the draft of those votes, to carry out the plan and circular exactly. I have examined the forms of preferred certificate and obligation and certificate of preferred stock, (one attached to paper marked "H," and the other, itself marked "I," and annexed to said deposition of Thayer.) They were accepted by me on the exchange of my bonds as being in conformity with the plan and circular, and as carrying out my agreement with the corporation. Until about the time that the plaintiff brought his suit, I never heard a suggestion from the directors or any of the bondholders that these certificates did not carry out the agrement, or were intended to vary it. Of the directors of 1862 and of 1863, three in each board were residents of Missouri.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except the paper marked "F" and the evidence to its execution, both for form and substance; not, however, withdrawing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

Cross-examined, de bene, by Mr. Lathrop, counsel for the plaintiff:

Up to June, 1870, no dividend was ever declared upon the preferred stock. The paper, marked "K," attached to said deposition of
90 Thayer, contains a copy of the votes declaring the dividend. Except the dividend declared on the 29th June, 1870, there has been no other dividend on the preferred stock. About the time that these votes declaring the dividends were passed, I did hear the question of the right, under the indenture, to declare a dividend on the common stock discussed. I think it was discussed in the meeting of the directors. There was not a difference of opinion among the directors as to their right to do this, that I am aware of. I think the plan and

agreement of bondholders, as well as the indenture, were before the board when the matter of declaring the dividends was discussed as I have stated. The indenture referred to in the certificate, marked "I," annexed to said deposition of Thayer, is the indenture, a copy of which is annexed to said deposition, and marked "F."

H. H. HUNNEWELL.

Dep. of W'm Boolt on the part of def't.

Deposition of William Boolt, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of defendant.

I, WILLIAM BOOLT, of Boston, Massachusetts, aged 65 years, depose and say:

I was one of the directors of the Hannibal & St. Joseph Railroad Company in 1862; had been for some years previous, and have been since up to within about a year of the present time. I have now no interest in the road whatever, and no connection with it; no interest in its bonds or stock. At the time the plan for extricating the road from its difficulties was framed, I saw it. I was not present at the meeting. I approved the plan. It is the plan, a copy of which is attached to the paper, marked "B," annexed to the deposition of Nathaniel
91 Thayer in this case. As one of the directors, I often saw the indenture, drawn after the plan was adopted, and I approved it. I don't know that I ever compared the plan and indenture, side by side, and word for word; but I supposed the indenture to be in conformity with the plan. My approval of the indenture was founded on that supposition. I was present at a meeting of the directors held on the 26th June, 1863. I voted for the resolution or vote passed at that meeting, as shown by the paper, marked "H," in said deposition of Thayer, and the form attached to said paper. I was also present at the directors' meeting held Nov. 24, 1862, and voted for the resolution or vote passed at that meeting, as shown by the paper, marked "D," attached to the deposition aforesaid of Nathaniel Thayer. In adopting the form of preferred certificate and obligation, (attached to said paper "H,") I supposed this certificate was the certificate to be created in accordance with the plan, and I understood it to conform to the terms of the plan. I have no recollection of anything said at the meeting which indicated that any of the other directors had any other view of it than mine.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except the paper marked "F" and the evidence as to its execution, both for form and substance; not, however, withdrawing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

Cross-examined, de bene, by Mr. Lathrop, counsel for the plaintiff:

I recollect a good deal of the conversation at these meetings, but I can't recollect the terms of it. I recollect Mr. Brooks' explanation of the plan at one of the meetings. At the time these meetings the Hannibal and St. Joseph Road was a good deal embarrassed
92 financially. They were unable to pay the interest-coupons on their bonds. This plan was intended to relieve the road. By it the bondholders surrendered their lien on the road to the extent to

which the' exchanged their bonds for preferred stock. The bonds were scaled. I believe something like thirty per cent. of the bonds were surrendered for preferred stock. At that time I can't tell you whether the common stock was worth anything in the market. I never operated in *in* the stock, nor bought or sold any. The property of the road was in danger of foreclosure, under the laws of the State, at the time. I can't answer whether, if the mortgages had been foreclosed and the property sold at that time, the road would have brought enough to pay the bondholders. The interest on the bonds was funded, as appears by the plan.

WILLIAM BOOLT.

Dep. of Sidney Bartlett on the part of deft.

Deposition of Sidney Bartlett, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said State and county, on the part of defendant.

I, SIDNEY BARTLETT, of Boston, Massachusetts, aged 72 years, depose and say:

I was a director of the Hannibal & St. Joseph Railroad Company in the year 1862; had been so for several years prior thereto, and am now such director. I attended a meeting of the directors of said corporation on the fifteenth of October, 1862, at which a draft of a plan for extricating the company from its difficulties, and improving its securities, was offered by Mr. Brooks, chairman of the board, and was adopted; a copy of which plan, and of the vote of the directors adopting the
93 same, are annexed to the deposition of Nathaniel Thayer, in this case, being the paper marked "B," and the paper thereto attached. Some time after the adoption of the plan the draft was placed in my hands, with instructions to prepare an indenture, which should contain appropriate provisions to carry said plan into effect, embracing the terms and manner of the exchange of bonds contemplated in it, and also provisions for the issue of preferred stock, in conformity to said plan. In pursuance of such instructions, I made a draft of an indenture, and submitted the same for examination to Mr. Brooks, Mr. Thayer, I think Mr. Hunnewell, and the other resident directors, and the same was afterwards adopted and executed. A copy of said indenture is annexed to said deposition of Thayer, marked "F." I drew said indenture with the purpose and understanding that the same should, and did, carry into effect the provisions of said plan, as to the terms and manner of the issue of preferred stock, the rights attached to said stock and to the common stock, as well as all other the provisions of said plan, without any intentional change or departure therefrom.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except the paper marked "F" and the evidence as to its execution, both for form and substance; not, however, withdrawing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

Cross-examined, de bene, by Mr. Lathrop, counsel for the plaintiff:

I cannot state the time when my attention was first called to the questions arising under the second clause of the indenture, marked "F,'

concerning the payment of dividends on the preferred stock. It was sometime before the beginning of this suit. I would add that
94 when my attention was called to it, I did not have the papers by me, and did not recall the history of the transaction. I think my attention was called to it by Mr. Watson's mentioning it in the office here. That's my best recollection. It isn't perfect. This was not at a meeting of directors. I think nobody else was here but Mr. Watson. I think Mr. Watson called my attention to the doubtful construction of the second clause, or what he supposed was the doubtful construction of it. Not having the original plan, or the certificate of preferred stock in my mind or before me, and not being called upon to review the whole transaction, I think I said to him, that it appeared to me that the clause raised a difficulty. I think it very likely that I said to Mr. Watson then, without having the facts or the plan or certificates in my mind, that the clause would be construed as claimed by the plaintiff in his bill. It was a cursory conversation. I didn't examine the matter.

S. BARTLETT.

Dep. of H. P. Kidder on part of deft.

Deposition of Henry P. Kidder, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of def't.

I, HENRY P. KIDDER, of Boston, Massachusetts, aged 48 years, depose and say:

I served as a director of the Hannibal & St. Joseph Railroad Company in 1862. I was first elected in 1859, and served continuously until I resigned on the 26th of February, 1863. I was present at the meeting of the directors Oct. 15, 1862, when the plan was presented by Mr. Brooks for extricating the road from its difficulties, &c., a copy of which is attached to paper marked "B," annexed to the deposition of Nathaniel Thayer in this case. I voted to approve of the plan. I think
95 the indenture marked "F," annexed to the said deposition of Thayer, was not adopted while I was a director. I was a director Nov. 24, 1862, and voted for the resolution or vote passed at the meeting of directors held on that day, as shown by the paper marked "D," annexed to said deposition of Thayer. On the first of April, 1863, I was a partner with said Nathaniel Thayer, and continued to be such till April 1st, 1865. As such partner I aided Mr. Thayer in getting the consent of the bondholders to the agreement to exchange their bonds as expressed in the paper marked "C," attached to said deposition of Thayer. I signed the agreement myself, being the holder of some of the bonds mentioned in the plan. I held some stock at that time; I don't remember how much. I knew of the indenture made to carry out the provisions of the plan, the same marked "F," as aforesaid. I had read it. There was no intention, so far as I knew, that the indenture should differ from the plan presented by Mr. Brooks and approved as aforesaid.

(Mr. Lathrop, counsel for the plaintiff, objects to all the foregoing testimony, except the paper marked "F," and the evidence as to its execution, both for form and substance; not, however, withdrawing his assent to the proof of all the records, writings, and documents, by copy hereinbefore made, so far as the original documents would have been competent and pertinent.)

Cross-examined, de bene, by Mr. Lathrop, counsel for the plaintiff:

I don't remember, particularly, having examined and compared the indenture and the plan to see if they agreed.

H. P. KIDDER.

96 *Supplemental dep. of Jno. W. Brooks on the part of def't.*

Supplemental deposition of John W. Brooks, taken before John W. Hudson, a notary public in and for the county of Suffolk, and State of Massachusetts, at the city of Boston, in said county and State, on the part of def't.

In my former deposition in this case I use the words "cumulative" and "not cumulative" in referring to such preferred stocks as I had heard of before. In this connection the word cumulative was intended to apply to such preference as if not paid *paid* in any one or more years, would be held as a liability to such preferred stock; as, for instance, in the case of a seven-per-cent. cumulative preference-stock, if no dividends whatever had been made for five years, there would have accumulated a liability to pay such cumulative preference-stock five times seven (or thirty-five) per cent. before the common stock would come in for a share of the earnings; while non-cumulative in this connection was intended to mean that the rights of the preferred-stock to dividends for any one year is to depend solely on the dividends made in that year. The fact of a dividend being not made in any one year, giving to such not-cumulative preferred stock no rights whatever, by reason of its not being made to any increased preference-dividends in any future year.

J. W. BROOKS.

We agree that we had notice and were present at the taking of the foregoing explanatory deposition.

D. THAXER,
Att'y for the Hannibal & St. Joseph R. R. Co., Def'ts.
LATHROP & BISHOP,
Att'ys for John Bailey, Complainant.

97 Attached to the foregoing supplemental deposition of Jno. W. Brooks, is an agreement between the parties, in words and figures as follows, to wit:

Agreement in relation to supplemental dep. of J. W. Brooks.

ST. LOUIS, *April* 8, '71.

JNO. W. BROOKS, Esq.,
Boston, Mass.

DEAR SIR: In your deposition, taken on the 3d inst., in the case of Bailey & Han. & St. Jo. Railroad Co., you say, "I had never heard of but two kinds of preferred stock, one in which the preference was to be cumulative, and the other in which it was to be not cumulative. The adoption of the non-cumulative plan was the intention." I have conferred with the counsel for the complainant, and we agree that you may go before the notary again (first giving notice to Mr. Lathrop and also to the legal adviser of the company in Mr. Bartlett's absence) and explain the meaning of the word cumulative in this connection.

Very respectfully your ob't s't,

THO'S T. GANTT,
Solicitor for Han. & St. Jo. R. R. Co.

We agree that Mr. Brooks may go before the notary who took his deposition on 3d April, 1871, and give the explanation suggested above, to be taken as a supplement to his original deposition.

THO'S T. GANTT, *P. D.*
GLOVER & SHEPLEY,
For Complainant.

EXHIBITS ANNEXED TO DEPOSITIONS OF NATHANIEL THAYER AND OTHERS ON THE PART OF DEFENDANT.

98 And the exhibits referred to in the foregoing depositions of N. Thayer and others, on the part of defendant, are respectively in the words and figures following, to wit:

Ex. "B," dep. of N. Thayer & others.

Exhibit "B" annexed to deposition of N. Thayer and others.

"The regular monthly meeting of the board of directors was held this Wednesday, Oct. 15, 1862—present, N. Thayer, J. W. Brooks, H. H. Hunnewell, Sidney Bartlett, H. P. Kidder, (5.) A plan for a re-organization of the securities of the road and for extricating it from its difficulties was presented by J. W. Brooks. After much discussion, on motion of Sidney Bartlett, seconded by N. Thayer, voted, That the plan be adopted and be submitted to the bondholders for their assent.

"Adjourned to meet on Wednesday 22nd, current, at 10 o'clock."

(For that part of Ex. "B," attached to deposition of N. Thayer and others, and referred to in said depositions as "a plan for extricating the road from its present difficulties, &c.," see Exhibit "A," defendant's answer, pages 33, 34, 35, 36, & 37 of this transcript.)

Ex. "C," dep. of N. Thayer & others.

Exhibit "C" annexed to depositions of N. Thayer and others.

(See Exhibit "B" of defendant's amended answer, pages 48 to 52, inclusive, of this transcript.)

Exhibit "D" annexed to depositions of N. Thayer and others.

(See Exhibit "C" of defendant's amended answer, page 52 of this transcript.)

Ex. "E," dep. of N. Thayer & others.

Exhibit "E" annexed to depositions of N. Thayer and others.

DEC. 13, 1862.

NATH'L THAYER, Esq.

99 DEAR SIR: You are hereby authorized to pay to any party or parties in New York whom you may consider it expedient to employ for the purpose of getting the assent & signatures of the bondholders to the plan for a re-organization of the securities of the Hannibal & St. Joseph Railroad Company, as set forth in a circular and agreement hereto attached, entitled: "Hannibal & St. Joseph Railroad, plan for extricating it from it present difficulties and improving its securities," dated Oct. 15, 1862, one-quarter of one per cent. on the amount of the bonds, for which they may procure subscriptions to said agreement from parties residing in New York, Philadelphia, & Baltimore, & the vicinity of these cities; provided that not less than three-quarters of all the holders of the bonds of said company shall come into the agreement; it

being understood that the company is to pay no commission in addition to the above one-quarter of one per cent.

Yours truly,

S. BARTLETT,
H. H. HUNNEWELL,
Committee on re-organization on behalf of the Han. & St. Jo. R. R. Co.

Ex. "F," dep. of N. Thayer & others.

Exhibit "F" annexed to deposition of N. Thayer and others.

(See Exhibit "A," complainant's bill of complaint, page' 10 to 22, inclusive, of this transcript.)

Ex. "G." dep. of N. Thayer & others.

Exhibit "G" annexed to deposition of N. Thayer and others.

(See Exhibits "E" & "F," defendant's amended answer, pages 52 to 56, inclusive, of this transcript.)

Exhibit "H" annexed to deposition of N. Thayer and others.

100 BOSTON, *June* 26, 1863.

The board met pursuant to adjournment, present, J. W. Brooks, S. Bartlett, N. Thayer, P. Butler, W'm Boolt, (5.)

On motion Sidney Bartlett, 2nd by N. Thayer, voted: That the following be adopted as the form of certificate or agreement for preferred stock issued by the corporation under the indenture between it and W. H. Swift and others, bearing date April 1st, 1863, and that the same be signed at New York by the transfer agents in that city, and in Boston by R. S. Watson, transfer ag't, and that all certificates and agreements heretofore issued in same form be, and they are hereby, ratified and adopted.

(Attached to the foregoing paper and forming a part of Exhibit "H," is the form of preferred certificate, &c., referred to in deposition of N. Thayer & others, for which form, see Exhibit "B," defendant's answer, page 37 of this transcript.)

Ex. "I," dep. of N. Thayer & others.

Exhibit "I" annexed to deposition of N. Thayer and others.

(See Exhibit "C" of defendant's answer, pages 38 & 39 of this transcript.)

Ex. "K," dep. of N. Thayer & others.

Exhibit "K" annexed to deposition of N. Thayer and others.

HANNIBAL & ST. JOSEPH R. R. COMPANY.

Circular.

BOSTON, *June* 29, 1870.

At a meeting of the board of directors of the Hannibal & St. Joseph Railroad Company, held this day:

On motion of N. Thayer, seconded by W'm H. Neilson, voted:
101 That, whereas, the earnings of the road for six months ending July 1st, 1870, are sufficient for the declaration of a dividend, all prior earnings having been applied to the improvement, maintenance, and working of the road—

Voted: That there be distributed to the holders of preferred stock of record, July 31st, 1870, 7 per cent. upon the amount of said stock, payable August 15, next, being the amount of preference to which they are entitled for the year 1870, as per the provisions of the indenture of April 1st, 1863, and that there be paid to the holders of the common stock, of record July 31st, 1870, a dividend of 3½ per cent., payable August 15, next, for the six months ending July 1st, 1870; and that the earnings of the road for the remaining six months be first applied to pay the further dividend of 3½ per cent. on said common stock, and that the books be closed from the 1st to the 16th day of August, 1870, inclusive.

By order of the board of directors.

R. S. WATSON, *Treas.*

102 UNITED STATES OF AMERICA,
Circuit Court for the Districts of Missouri, ss:

I, Austin Drake, clerk of the circuit court of the United States in and for the districts of Missouri, do hereby certify the writing hereto annexed to be a transcript of the record and proceedings in case of Jno. Bailey, complainant, against The Hannibal & St. Joseph Railroad Company, defendan', as fully as the same remain on file and of record in said case, in my office.

In witness whereof I hereunto subscribe my name, and affix the seal of said court, at office in the city of St. Louis, in said districts, this fourteenth day of November, in the year of our Lord eighteen hundred and seventy-one.

[SEAL.] AUSTIN DRAKE,
Clerk of said Court.

(Indorsed:) United States circuit court, districts of Missouri. John Bailey, complainant, against The Hannibal & St. Joseph Railroad Company, defendant. Duly certified transcript of the record and proceedings in the above-entitled cause.

103 In the Supreme Court of the United States.

JOHN BAILEY
against
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY. } No. 452.

It is agreed that, at the time of the trial of this cause in the circuit court of the United States for the districts of Missouri, that the complainant objected to all those portions of the depositions read in evidence by complainants that tended to show any agreement of the bondholders of said company to accept the provisions of the circular issued by defendant, dated October 15, 1862, & to said circular, & to all testimony offered on the part of defendant tending to explain the *the* meaning or effect of the indenture of the first of April, eighteen hundred and sixty-three, or the certificates of preferred stock issued by defendant, as be-

ing irrelevant & incompetent testimony. & the court, upon hearing the objection, remarked that the same would be considered in making up its opinion in the cause.

The foregoing agreement shall be considered, and taken as part of the record in this case.

THO'S T. GANTT,
For the Hann. & St. J. R. R. Co.
GLOVER & SHEPLEY,
Sol's for Complainant, John Bailey.

(Indorsed:) Sup. Court U. S., 1871. Dec. term. No. 452. Bailey, app't, vs. Hannibal & St. Jo. R. R. Co. Agreement. Filed 2d December, 1871.

(Indorsement on cover:) No. 452. John Bailey, appellant, vs. The Hannibal & St. Joseph Railroad Company. Missouri C. C. U. S. Filed 1st December, 1871.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN BAILEY, Appellant,

against

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Respondent.

STATEMENT AND BRIEF

By GLOVER & SHEPLEY, *Solicitors.*

Levison & Blythe, Printers, 219 Olive Street, St. Louis.

IN THE

Supreme Court of the United States.

JOHN BAILEY, APPELLANT,

against

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,

RESPONDENT.

STATEMENT OF THE CASE

FOR THE

Complainant, Appellant, by Glover & Shepley, his Solicitors.

This was a bill in equity, brought by Bailey as being an owner of 800 shares of preferred stock, in the Circuit Court of the United States, for the District of Missouri, against the Hannibal and St. Joseph Railroad Company, to enjoin that company from paying a certain dividend upon the common stock of the company.

The bill stated substantially this: That prior to the first of April, 1863, that company had issued three classes of bonds, secured upon the property of the company at different times; that the company was delinquent in its interest on those bonds for a considerable period, and had become greatly embarrassed; that the company had never paid any dividend upon the

stock, and that it had then, in the embarrassed state of the company, no pecuniary value; that in April 1st, 1863, the company executed a certain indenture, being an agreement and trust to trustees for the purpose of having the bondholders release part of their indebtedness, surrender these bonds and cancel the mortgages, and accept, for a certain portion of the indebtedness, preferred stock of the company to be issued to them, upon such surrender, of the character and entitled to the dividends as provided in the indenture; that the holders of the bonds came in and accepted this arrangement, and received certificates of preferred stock of the company; that by the terms of the indenture and certificate, the holder of this preferred stock was entitled, out of the net earnings of the company, to have a dividend declared upon his preferred stock of 7 per cent., and if after this dividend was appropriated, there should remain any residuum, then such holder of preferred stock was entitled to share equally with the holders of common or unpreferred stock in any dividend that might be declared from the residue of the net earnings; that he was the owner of 800 shares of preferred stock; that no dividend had ever been declared by the company till about the 29th June, 1870, when a dividend of 7 per cent. was declared upon the preferred stock; that after appropriating this amount of 7 per cent. dividend upon preferred stock, that a residue remained equal to 3½ per cent. and more; that the directors of said company, instead of dividing that residue equally between the preferred and unpreferred or common stock, declared a dividend of 3½ per cent. on the common stock, and no further dividend upon the preferred stock; that any such declaration or payment of 3½ per cent. upon the common stock is contrary to the terms of the indenture and of the certificate of preferred stock; that by the provisions thereof, such 3½ per cent. was to be shared equally between the common and the preferred stock, and prayed for an injunction restraining the company from paying any such dividend upon said common stock.

The answer of the defendant admitted the facts stated in the bill as to the mortgages and its embarrassed condition, and set up that in October, 1872, the directors issued and sent to the bondholders

a circular by which it proposed a plan for the surrender of their bonds and release of their mortgages, by accepting of a preferred stock to be issued by the company for a part thereof; that the plan in the circular provided that such preferred stock should be, out of the net earnings, entitled to receive first a dividend of 7 per cent thereon, and then the common stock should, out of any surplus, be entitled to a dividend to be next paid up to 7 per cent, and the residue should afterwards be divided equally between said preferred and unpreferred stock; that the words of said circular were as follows: "The preferred stock to be 7 per cent and not cumulative, but to share with the common stock any surplus which may be earned over and above 7 per cent upon BOTH in any one year;" that to this circular was an agreement to be signed by the bondholders agreeing to surrender their bonds and accept preferred stock and other bonds in the manner as provided in said circular; that the agreement was signed by the bondholders, and a committee was appointed on the 24th November, 1862, to carry out the intentions of the circular, and that they prepared an indenture, bearing date April 1, 1863, and reported it to the company, which was at a stockholders' meeting in May, 1863, ratified at a called meeting of the company to see whether they would ratify the agreement provisionally made with the bondholders on or before 24th November, 1863; that the stockholders intended to ratify, and supposed they were ratifying the agreement as contained in the circular, and believed that the indenture carried them out; that said indenture was executed by the company; that the certificates of preferred stock were received by the bondholders as a full compliance with the terms of the indenture; that, by the terms of the certificate, the preferred stock was first to receive 7 per cent out of the net earnings, to the exclusion of the common stock; that out of any surplus the common stock was next to receive a dividend up to 7 per cent, and any balance after paying a dividend of 7 per cent *on both* were to be equally divided; that 7 per cent had been declared upon the preferred stock, and that there was not sufficient surplus to declare a dividend of a like amount upon the common stock, and that

the complainant was therefore not entitled to receive any other dividend than the 7 per cent already declared.

On the trial the complainant gave in evidence the indenture of the 1st April, 1863, made by the defendant to William H. Swift, Sidney Bartlett and Nathaniel Thayer, as trustees for the parties holding the various bonds and providing for the manner of exchange, surrender of bonds, release of mortgages, the issue of preferred stock, and the amount of the dividends to be paid thereon, and for the exchange of such preferred stock for bonds. That portion of the indenture referring to dividends is in these words: "That said preferred stock shall be entitled to a dividend of 7 per cent. from the net earnings of said road, in each year, before any dividend shall be declared upon other unpreferred shares of the said corporation, *and to an equal dividend with said other shares, in the net earnings of said corporation beyond* SAID *seven per cent.*"

That at a stockholders meeting held on the 30th of May, 1863, the stockholders ordered and directed the proper officers of the company to execute it, which was done. The complainant also gave in evidence the certificate issued by the defendants for the preferred stock of the company, in which it is stated that they are "issued in adjustment of the bonds of the company, bearing date," etc., "and subject to the terms and conditions of an indenture between the said corporation and Wm. H. Swift and others, trustees, dated April 1, 1863, and with the rights therein set forth," and certifies that the holder "is entitled to —— shares of the *preferred stock* of the said corporation, and shall be *entitled to receive all the net earnings of said company which may be divided pursuant to said indenture, in each year up to* $7 *per share, and to share in any surplus beyond* $7 *per share, which may be divided upon the common stock.*"

The defendants on their part offered evidence tending to prove that the Board of Directors prepared the circular to the bondholders, or plan spoken of in the answer, and sent it to all the bondholders for their assent. That a large majority of the bondholders assented to it. That, thereupon, a committee was appointed to draft an agreement in conformity with the plan;

that the committee drafted and submitted the indenture given in evidence by complainant and subsequently ratified by the stockholders. That it was intended that the indenture should conform in its terms to the plan mentioned in the circular. That the call for the meeting of stockholders was to see if they would carry out the plan mentioned in the circular.

To all this evidence the complainant objected as incompetent and irrelevant: that this previous action could not vary and control the terms and conditions of the indenture subsequently drawn and approved at a meeting of the stockholders and ordered to be executed, and the terms and conditions of the certificate under which the stock was held. The court ordered the testimony to be read subject to the objections, to be disposed of with the final decree in the case.

By this proof it appeared that the circular had been assented to by holders of bonds to the amount of $5,814,000 out of the $7,349,500 of bonds outstanding.

The only question presented by the case is, as to what amount of dividend is the holder of shares of preferred stock entitled. Is it (as contended for by the complainant) *first* to a dividend up to seven per cent. out of the net earnings, to the exclusion of the common stock, and then if there is any residue of net earnings to be divided, *next* to an equal share with the common stock, in any division to be made of the residue, or is it (as contended for by the defendant), that out of the net earnings the preferred stock is *first* to a dividend of seven per cent., then if there is any residue, the common stock is *next* to receive a dividend until it reaches seven per cent. and after these two dividends have been appropriated, the *surplus* is to be divided equally between the common and the preferred stock. Both agree that the preferred stock is first entitled to a dividend of seven per cent., and it is only as to what disposition is to be made of the residue of the net earnings that the difference arises.

The court dissolved the injunction and dismissed the bill.

ASSIGNMENT OF ERRORS.

The appellant assigns as error in the decree the following:

First. In that the court dissolved the injunction.

Second. In that the court dismissed the bill.

Third. In that the evidence presented and offered by the defendant as to what took place prior to the meeting of stockholders, if admitted, was no defence to the suit, and was incompetent and irrelevant.

BRIEF FOR COMPLAINANT, APPELLANT.

To reverse the judgment in this case, the appellant relies upon the following propositions:

I.

The situation of the stockholders at the time the agreement was entered into was that of absolute and certain destruction to all their interests in the company and its property, unless then relieved, and relief could be afforded in no other way, and the trust and agreement called the indenture is to be viewed in the light of these facts.

Upon the road, rolling stock and franchise there was first the lien of the State for $3,000,000. Upon this property thus originally encumbered, the company placed three mortgages (including its lands); 1st, A mortgage dated April 1st, 1856, for $5,000,000, payable in 1881, with semi-annual interest at 7 per cent. upon its *lands in Missouri.*

2d. A mortgage dated July 1, 1858, for $1,500,000, payable in 1883, with semi-annual interest at 7 per cent. upon *its road, franchise and property*, subject to said lien of the State, and also including its lands.

3d. A mortgage dated November 15, 1859, for $1,500,000, payable in 1889, with 7 per cent. interest semi-annually upon all its property.

So that on the 1st of April, 1863, the lien of the State, together with the bonds and unpaid coupons, amounted to over $12,000,000. The net yearly receipts were estimated to be $450,000. The unpaid coupons and interest due the State amounted to considerably more than one and a half millions.

The road was not only in this apparently absolutely insolvent condition, but the whole resources of the company were needed to repair the ravages of war and place the road in a condition where it could earn anything. It was evident, therefore, that if the bondholders foreclosed the whole property would be swept away from the stockholders forever.

The stockholders, therefore, were in earnest in devising means to extricate themselves from impending ruin, by presenting to the bondholders sufficient inducement for them to forego the advantage they had, and put the company and road in such a condition that they could pay the interest after that time on a portion of the debt—the bondholders not only surrendering *part of their debt but all the accrued interest.*

II.

That result was produced by the agreement of April 1st, 1863, called the indenture, which is the contract and the only contract made by the company with the holders of its bonds, and it speaks but one language in respect to this matter.

By its terms it provides as to the

1st Mortgage bonds, that the holders were to surrender 30 per cent. of these bonds and all the unpaid coupons, and accept preferred stock for the amount; and as to the

2d Mortgage bonds, that the holders should surrender 40 per cent. of these bonds and all the unpaid coupons, and accept therefor preferred stock for the amount; as to the

3d Mortgage bonds, that the holders should surrender the whole of these bonds and unpaid coupons, and accept preferred stock for both bonds and coupons.

By making this arrangement the stockholders not only prevented the foreclosure, but in case of foreclosure, subsequently

placed the preferred stock on the same platform as their own stock, as in case of foreclosure the preferred stock occupied no better position than the common stock in sharing the surplus, the preference being only as to dividends.

The only advantages secured to the bondholders in thus surrendering and accepting the preferred stock were, 1st, a preference over the common stock to the extent of *first* receiving 7 per cent. dividend. *Second*, an equality with the common stock to the same extent as declared upon that.

If, therefore, the road was so prosperous as to be able to declare 7 per cent. dividend upon the preferred stock, and have a surplus equal in amount to six per cent. upon the amount of the common and preferred stock, all that the preferred stock could get would be 13 per cent., but all that they could expect to get for some time would be 10 to 10½, and this is all the holders of the preferred stock, who at the time of the surrender held the bonds, would receive after waiting long years; so that in point of fact, before they received a cent of dividend upon their preferred stock, they would, if they had retained their bonds, have received interest of 49 *per cent.* upon the bonds they surrendered.

The terms of the indenture are perfectly plain and perfectly unambiguous, and admit but of one interpretation.

These words are, "And the corporation (the Hannibal & St. Joseph Rail Road Company) covenants and agrees that said preferred stock shall be entitled to a dividend of 7 per cent. from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividends shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares in the net earnings of said corporation beyond SAID 7 per cent., but shall at no time be entitled to an accumulated dividend (in case a dividend shall fail to be made in any one or more years, or if made, be insufficient to pay said 7 per cent.) in any subsequent division of said net earnings, but shall be entitled only in that event to said 7 per cent. and to share in the surplus earnings as aforesaid."

Taken by themselves, these words have but one interpretation—are susceptible of but one. If language can be made plain, this

language asserts, 1st, that when net earnings have been earned they are to be applied first to the payment of a dividend of 7 per cent. per annum upon the preferred stock, before any dividend whatever shall be paid upon the common stock; and, 2d, after such earnings have reached 7 per cent., which the preferred stock is entitled to have paid to it, the preferred stock shall share equally with the common stock in all the net earnings beyond that sum.

That this is so, seems to us to be beyond all question, for

1st. The words of the indenture are that a dividend of 7 per cent. upon the preferred stock is to be first declared "before any dividend shall be declared upon other unpreferred shares of said corporation, and to an *equal dividend* with said other shares in the net earnings of said corporation beyond *said* 7 per cent.

The word "*said*" fixes the construction of the language used as referring to and calling for an equal sharing between the common and preferred stock of all the net earnings beyond the "said" 7 per cent. first payable to the holders of the preferred stock. It contracts that the holders of the preferred stock shall equally share in any dividend which may be declared from the net earnings beyond the *said* 7 per cent., which by the terms of the indenture was first to be set apart for a dividend upon the preferred stock. Nor is this denied. The Court in its opinion (1 Dillon, Rep. 177), concedes that the literal words of the indenture admit of but one interpretation, but maintaining that the construction of the stock certificate is antagonistic to such a view, holds that "the use of the word '*said*' in the phrase 'said 7 per cent.' is a clerical error."

We hope to show, and think we shall further on conclusively show, *first*, that the words in the indenture cannot be controlled by the words of the certificate; and, *second*, that the construction of the certificate given by the court is not warranted by the language used in it.

But before proceeding to that inquiry, we maintain, 2d, that if the word "*said*" be rejected and expunged, the meaning and force of the language used remains the same, and the remaining language of the clause referred to does not admit of being tor-

tured into the construction attempted to be put upon it. Strike out the word "said" and that part of the clause reads thus: "And to an equal dividend with said other shares in the net earnings of said corporation beyond 7 per cent." Is there any ambiguity here? In what is there pledged to the holders of the preferred stock an equal dividend with the other shares? It is in all the net earnings of said corporation beyond 7 per cent. of them. The "net earnings" is a certain thing. All "beyond seven per cent." of them is a certain and fixed thing, and it is that part of the net earnings beyond seven per cent. of them (even if we reject the obstinate word "said") that the indenture says shall be equally divided between the preferred and common stock, or so much thereof as the directors set apart to be distributed. It requires an entire reconstruction of the whole sentence to admit of the interpretation that the defendants wish to give it. It is impossible that the draftsman had such an idea in his mind when he made use of these words. There is nothing said about a dividend upon common stock, or how much it shall be; but only that when any dividend is made from what remains of the net earnings after first setting apart seven per cent. dividend for the preferred stock, it shall be divided equally between the common and preferred stock.

Make the attempt to give it the construction contended for by defendants by adding or subtracting a word, or both, and it is of no avail. You will have to reconstruct the sentence somewhat in this way: "and to an equal dividend with said other shares in the net earnings of said corporation, after seven per cent. shall have been declared upon both common and preferred stock," and then you would obtain (by indirection only, however) a declaration of a dividend of a certain amount to be declared upon the common stock.

But in order to give to the sentence the full idea of the construction contended for, you have to add to it by inserting a new phrase containing a new idea, as thus: "and to an equal dividend with said other shares in the net earnings of said corporation beyond said seven per cent., *after an equal dividend shall have been next declared upon the said unpreferred stock.*"

3d. The words that follow that part of the sentence which we have been commenting on, show that no such construction is admissible.

The continuation of the sentence is, "but shall at no time be entitled to an accumulated dividend (in case a dividend shall fail to be made in any one or more years, or if made, be insufficient to pay said seven per cent.,) in any subsequent division of said net earnings, but shall be entitled only, in that event, to said seven per cent. and to share in the surplus earnings as aforesaid." All that is called for here is, first, the "said seven per cent." and next the "surplus earnings." Nothing is said about another seven per cent. to be carved out of the "surplus earnings" before the "sharing" was to take place.

The ingenuity of man is not sufficient, either to torture the language made use of in this indenture into the construction contended for by defendants, or to show that there is any ambiguity as to its meaning.

Unassisted by extraneous facts, no one would for a moment hesitate as to its meaning, and would contemptuously reject the possibility of such a construction as contended for by the defendants.

III.

If there is any difference, as to this matter, in the language used in this indenture and in the certificate of preferred stock, or any ambiguity in the words of the certificate, the certificate is to be controlled and explained by the indenture, and not the indenture by the certificate.

This must be so for two reasons, first, because the indenture is the contract between the corporation and the bondholders, on the faith of which the bondholder surrenders his bonds and receives in lieu thereof the preferred stock, entitling him as owner of preferred stock to certain dividends. Stock of the kind and character contracted for in the indenture he has the right to demand of the corporation. He gets his right to it alone under said agreement, and the corporation is under no obli-

gation to give, nor has he any right to demand, any stock differing in any manner or quality from that specified in that indenture. The certificates are issued under it, and if they did not conform to the conditions of the agreement under which they were received, the company could be compelled to make them conform.

But secondly, if there was any question as to this, the proposition contended for is placed beyond question by the words of the certificate itself. On the face of the certificate it is stated to be "issued in adjustment of the bonds of said company bearing date April 1st, 1856, July 1st, 1858, and March 15th, 1859, and subject to the terms and conditions of an indenture between said corporation and William H. Swift, and other trustees, dated April 1st, 1863, and with the rights set forth therein;" and further on it states that A B is entitled to so many shares of preferred stock, "and to receive all the net earnings of said company which may be divided pursuant to said indenture," etc.

So that on its face it states that it is "subject to the terms and conditions" of the indenture, and that the holder of the certificate is entitled "to receive all the net earnings of said company which may be divided pursuant to that indenture." The concluding part of the certificate might be rejected as surplusage whatever its language should be as to dividends, because that is already fixed by the terms of the certificate to be as mentioned in the indenture.

If we are right as to the necessary construction of the indenture, and that its terms, by the language of the certificate, control as to this matter of dividends, then this question is settled, and we need not to inquire what is the true construction of any other language that may be found in the certificate.

But we shall now attempt to show that the other language used in the certificate, instead of being antagonistic to the plain and literal meaning of the words of the indenture is entirely consistent with it, and standing alone and without reference to the words connecting the certificate with the indenture, would go strongly to confirm our construction of it.

IV.

If we pay no attention to what we maintain are the controlling words in this certificate, yet the words remaining are at one with the terms of the indenture, and are not susceptible of any other interpretation without a violent wrenching of the sentence from what is the literal signification of the words made use of.

We have, in discussing the last proposition, shown how entirely the words in the certificate, calling, as they do, both for the "rights" conferred by the indenture, and "to receive all the net earnings of the company which may be divided pursuant to said indenture," control any other words that may be used therein in relation to dividends, and it is unnecessary to pursue this branch of the argument further.

We now come to consider the true construction of the other words made use of in the certificate, and maintain that the construction contended for by the defendant is a forced construction, and if the other words (without extraneous evidence) stood alone, would have to be abandoned. We submit, *first*, that the construction contended for by complainant is the obvious one—the one that would at once, upon the reading of the words, present itself to the mind without hesitation, not only as the true construction but the *only* construction, and it is only after repeated suggestions that these words are susceptible of another meaning that the mind turns to consider whether such interpretation is possible.

The words are "and to receive all the net earnings of said company, which may be divided pursuant to said indenture in each year up to $7 per share, and to share in any surplus beyond $7 per share which may be divided upon the common stock. In reading this would any doubt suggest itself as to the meaning? Would any doubt suggest itself that when, after speaking of the dividend of $7 per share to be applied as a dividend upon the preferred stock, the sentence continued, "and to share in any surplus beyond $7 per share" it had reference to the surplus remaining after the $7 had been applied to the payment of a dividend of that amount on the preferred stock?

Is it not palpable that the meaning is as if it had said "and to share in any surplus beyond said $7 per share." If you suggested that in using the phrase beyond $7 per share, it referred to a dividend of $7 per share to be *next* declared upon the common stock, the answer would be that such a construction is not possible, because no dividend upon the common stock had been spoken of, and therefore the words "beyond $7 per share" could only relate to the $7 per share spoken of in that part of the sentence immediately preceding.

We submit in the second place that to make the construction tenable that the "$7 per share" spoken of in the phrase "beyond $7 per share" had reference to a dividend to be next divided of that amount upon the common stock before the "surplus" came, (which was to be shared equally between the preferred and common stock), you necessarily supply words and a number of them, in the mind before such a meaning can find any resting place therein. You would have to supply and insert after the words "beyond $7 per share" some such words as these: *to be next declared upon the common stock*, and also the word "afterwards" between "may be" and "divided." It will be insisted on that you have only to change the whole form of the sentence, and make it read in this wise: "and to share in any surplus which may be divided upon the common stock beyond $7 per share" to make it have the meaning contended for by defendant. To this it is answered that you can change the meaning of any sentence by changing the form of the words, but, in truth, that does not make it any clearer. The last part of the transposed sentence should have been changed so as to read "after (instead of 'beyond') $7 per share shall have first been divided upon the common stock."

After the appropriation of a dividend to the preferred stock of 7 per cent out of the net earnings, but one thing is spoken of to be disposed of and appropriated, and that is "the surplus," and it is that "surplus" which the certificate says shall be shared in by the preferred and the common stock. If the construction of the defendant was correct then there would be first a *residue* of net earnings after appropriation of the dividend of

7 per cent to preferred stock, out of which the common stock was to receive a dividend up to 7 per cent, and, if there was anything left, that "surplus" was to be divided; whereas it is the surplus as an entirety—all that is left after the first dividend of 7 per cent—that the certificate says shall be shared between the preferred and common stock. What a curious use of language this is, as used in the certificate, if the defendants construction be correct, and especially so in veiw of the eqally short and perfectly decisive terms used in the "plan" or circular which, it is contended, the form of words was intended to represent and embody.

As the judgment in the court below is based solely on the construction given to these last words of the certificate, let us see if the reason given for the conclusion reached can be supported.

The court says, (at page 177, 1 Dillon, R.): "The surplus mentioned in the certificate refers to what may remain after the preferred and the common stock has each had its $7 per share. If the intention had been as claimed by the complainant, all the language after the word 'surplus' would be unnecessary, and the construction put upon it by the company is the only one which will give effect to all the language employed."

Is it true, that if the construction claimed by complainant be the correct one, all the language after the word "surplus" would be unnecessary? We think we have already shown that the "$7 per share" spoken of after the word "surplus," is the $7 per share previously referred to, and is placed there to make the meaning more clear.

But does the court mean what it says? If so the part of the sentence under consideration would read as follows: "and to share in any surplus." It could not have meant that, as it is nowhere said with *whom* the preferred stock is to share it. It therefore must have meant to say that the words, "beyond $7 per share," were unnecessary under our construction. But these words are not unnecessary. They serve more fully to develop the meaning. It is as if instead of these words," beyond $7 per share," the words, "after satisfaction of the dividend

upon the preferred stock," had been inserted in their place. The sentence might be said to be definite enough without the words, "beyond $7 per share," but not *so* definite as with them.

The retention of these words are entirely consistent with, and, we say, supports our construction, but to carry out the construction given by the court, it is necessary to insert between these words "shares" and "which," these words or a form of words containing a similar idea, viz: "next to be divided upon the common stock."

To put it in the mildest form, the court is asked to give a different construction to the tenor of this certificate from what the language used would ordinarily import in favor of the corporation issuing it, and against the party who holds rights under it. This is reversing the wholesome rule often laid down by this court, that in case of ambiguities or uncertainties in instruments issued by a corporation, they should be resolved against the corporation and in favor of the party holding under them.

Charles River Bridge Co. vs. Warrer Bridge: 11 Pet., 544.

Richmond Railroad Co. vs. Louisa Railroad: 13 How., 71.

Rice vs. Railroad Co.: 1 Black, 358.

V.

No evidence of any previous plan or proposed arrangement, submitted by the Board of Directors to the bondholders, even if assented to by all of them, is admissible to vary or control the indenture, assented to by a vote of stockholders, at a meeting called for the purpose of presenting it to them, and adopted and executed by the corporation in conformity with said vote for.

1st. However much the variance may be between the indenture and the plan adopted by the directors and assented to by some of the bondholders, yet the stockholders voted for and the corporation adopted a specific instrument submitted to them. Suppose that after the plan was proposed it had been assented to by all the bondholders, and then the plan was designedly changed

by the committee without fraud, but considering that it could be changed beneficially for all parties, and that the indenture prepared in accordance with the change and as written out and submitted to the stockholders was adopted by them, could it be for a moment contended, in the absence of fraud, that this indenture thus formally adopted as the particular deed of the corporation could be altered and changed, simply because there had been a recommendation of and assent to another proposed arrangement.

If the indenture had provided for a preferred dividend of six per cent instead of seven per cent, will it be contended that because the plan proposed one of seven per cent instead of one six, the indenture solemnly adopted at a meeting of the stockholders calling for six per cent could be changed to conform to something that they did not vote for? All that went before were propositions which bound nobody—neither the corporation nor the bondholders. The directors were at liberty the next day, after obtaining the signatures of all the bondholders, to propose another plan, and the bondholders were at perfect liberty to propose another method or to withdraw their assent to the one proposed.

Any stockholder at the meeting had a right to suggest any alteration or modification in any indenture proposed, and any bondholder had the right to insist upon the indenture adopted, however wide might be the departure from the proposed arrangement, and however much he may have assented to it.

If the stockholders had passed a vote directing that the directors carry out the proposed plan, and then the Board of Directors had prepared this indenture and had it executed there would have been some grounds for insisting that, by mistake, a different instrument had been really executed from what was intended, but where, as in this case, the corporation adopted the precise instrument, then, in the absence of any ambiguity, all previous plans, suggestions or proposed arrangements go for nothing.

2d. But not only the corporation adopted and executed the particular instrument, but the trustees named therein did so for themselves and on behalf of the holders of the bonds, and it thus

became a complete instrument, unambiguous in its terms, and to be interpreted as any other instrument by the fair import of the terms made use of.

3d. After this time it was not binding on the individual bondholders till, by surrendering his bonds, each became a beneficiary under it. Any bondholder could at any time assent to and accept its terms or decline them.

He was in no manner bound by anything that had gone before. If, on examining it, he liked its terms, he could adopt it and act under it, and the moment he did so it was not in the power of the corporation and all the other bondholders to change it without his assent.

4th. There is no evidence but that the bondholders had changed between the time of the presentation of the plan and the executing of the indenture, and, on the contrary, the strongest reason for believing that there were many owners of the bonds at the time of the adoption and execution of the indenture who never had seen, or, indeed, knew of the plan. The assent of a former owner, however binding on him in no manner bound the present owner.

5th. Not only by the admission of this evidence is it sought to control this indenture, but also the certificates of preferred stock issued by the company. The certificates refer to and call for the rights secured by the indenture, and all that a purchaser is required to do is to inform himself of the "terms and conditions of the indenture." He examines it, sees its terms, and purchases on the strength of the rights secured to him by the indenture and by the terms of the certificate.

We ask can it be possible that a person desirous to purchase the preferred stock, and making an examination of these certificates, and seeing the language used in the certificates and the reference also therein that the dividend on this stock is to be governed by the terms of a certain indenture which he goes and examines, and consults the records of the company and finds it adopted by the stockholders and afterwards executed by the company, is not protected, if he purchase the stock, from the consequences of having these two solemn instruments over-ruled and controlled by the terms of

a mere proposition made previously by a committee of the Board of Directors, having no existence on the records of the company, but existing only as fortuitously preserved perhaps in some dusty pigeon-hole in the office of the company, perhaps in the office of some counsel of the company.

VI.

Until the indenture and the certificates are sought to be reformed by a proceeding in which the trustees are made parties, the alleged facts offer no defence to this suit.

This has not been done, and the facts as shown by the evidence submitted on part of defendant show that no such reform is possible.

In order to present a case for the reform of the indenture by reference to the terms of the plan and any assent thereto, it is essential that the proposed arrangement should be assented to *by all* the bondholders, and as the proof shows that only about three-fourths of the bondholders assented to the proposed arrangement, all that can be claimed for it is that a sufficient number of bondholders approved the proposed arrangement to give the directors every reason to believe that some such arrangement would be acceded to by all.

According to the evidence there were in amount $7,349,500 of all kinds of bonds outstanding, and $5,814,000 are all in amount that appears upon the paper prepared by Mr. Thayer for the purpose of obtaining an assent. Beside it is now too late, if all the bondholders should assent and agree to a decree. Their assent now could not affect the holders of the certificates which have been transferred by the original holders and have passed through many hands since they were first issued.

The rights of those holders are fixed by the indenture and the certificate.

GLOVER & SHEPLEY,

For Complainant.

In the Supreme Court of the U.S.

DECEMBER TERM, 1872.

On Appeal from the United States Circuit Court for Missouri. In Chancery.

JOHN BAILEY, Appellant,

vs.

THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellee.

Levison & Blythe, Printers and Stationers, 219 Olive Street, St. Louis.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1872.

On Appeal from the U. S. Circuit Court for Missouri.
In Chancery.

JOHN BAILEY, APPELLANT.
against
THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, APPELLEE.

In this case the bill of complaint, which was filed November, 1870, set forth the incorporation of the Hannibal and St. Joseph Railroad Company in the year 1847. That prior to the year 1863, the company issued and delivered its certificates of stock, afterwards described in the bill as common or unpreferred stock, divided into shares of one hundred dollars each, and amounting in all to about three millions of dollars, or thirty thousand shares. That it constructed the road, got possession of its lands, and executed three mortgages securing bonds issued in aid of the completion and operating of the road. That these bonds were, prior to 1st April, 1863, held by various parties, and the company was on that day unable to pay its interest thereon, or any dividend on its stock, and that the stock was then "without any pecuniary value;" and that if there had then been, as was threatened, a foreclosure of said mortgages, the whole property

would have been sacrificed. That on the 1st April, 1863, the said company made its conveyance, produced to the court, and marked as "Exhibit A." That the terms of this deed were accepted by the holders of the bonds aforesaid, in the manner prescribed by said deed, and that preferred stock, as therein described, was issued to and taken by the said holders of bonds. A copy of the certificate so issued was made part of the bill. That by the surrender of the bonds and the taking of said preferred stock in lieu thereof, the bondholders lost valuable privileges, and were, in recompense, entitled to all the privileges provided for in the deed in respect of the preferred stock.

The bill then alleges that by virtue of said deed and said certificates of preferred stock, the holders thereof became entitled to receive from the net earnings of the road in each year, before any dividend should be made on the unpreferred stock, a dividend of seven per cent; and in addition thereto and beyond said seven per cent, to share equally with the common stock in the residue of such net earnings. That in January, 1864, an act was passed by the Legislature of Missouri, legalizing and validating the arrangement of 1st April, 1863. That the complainant is the holder of 800 shares of said preferred stock. That on or about June, 1870, the company paid a dividend of seven per cent on the preferred stock. That there was moreover a surplus of net earnings then on hand, and that the company had thereout declared and paid a dividend of three and a half per cent upon its unpreferred stock, to the exclusion of the preferred stock; and that said company threatened and purposed, out of the surplus of the net earnings of the said road for the year 1870, to declare and pay a further dividend of three and a half per cent on the unpreferred stock before paying anything further on the preferred stock, or admitting the preferred stock to share said surplus. That such appropriation of the surplus was injurious and inequitable, and in violation of complainant's rights as a holder of preferred stock. That the complainant was remediless at law, and that the appropriate remedy was by injunction, etc.

The indenture made on the 1st April, 1863, conveyed all the

In the Supreme Court of the United States.

DECEMBER TERM, 1872.

WILLIAM MASON, *Appellant*,
vs.
THE UNITED STATES. } No. 115.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

lands, etc., therein mentioned to trustees; and then, reciting the several mortgages and the bonds secured thereby, declared that the company found itself unable to pay the interest on these bonds, and that thereupon the holders thereof agreed with the company that the holders of the first mortgage bonds should receive from the corporation, in exchange therefor, new bonds of the corporation to the extent of seventy per cent of the principal thereof, with semi-annual interest coupons thereon after 1st April, 1864, at the rate of seven per cent, and to preferred stock for the residue, or thirty per cent of said first mortgage bonds, together with the amount of the unpaid interest coupons thereof. The indenture went on to say that the corporation covenanted and agreed that the holders of such preferred stock should be entitled to a dividend of seven per cent from the net earnings of the road in each year, whenever a dividend of such net earnings should be made, before any dividend should be declared upon the shares of unpreferred stock of the corporation, and to an equal dividend with said other shares in the net earnings of said corporation beyond said seven per cent; but that the same should not at any time be entitled to an accumulated dividend (in case a dividend should fail to be made in any one or more years, or if made should be insufficient to pay said seven per cent) in any subsequent division of said net earnings, but only to seven per cent and a share of the surplus. Provisions somewhat similar, but less favorable, were made in respect of the holders of the second and third mortgage bonds. The preferred stock was uniform in its nature throughout. The terms made by this indenture were but provisional, and dependent on two contingencies: First. On the ratification of the scheme by the Missouri Legislature. Second. On the acquiescence in it of all the bondholders.

The certificate of the preferred stock set forth that the Hannibal and St. Joseph Railroad Company hereby certify that in consideration of the surrender and placing in trust of bonds and coupons in pursuance of said indenture, "is entitled to shares of the preferred stock of said corporation, and to receive all the net earnings of said company which may be divided

pursuant to said indenture in each year, up to seven dollars per share, and to share in the surplus beyond seven dollars per share which may be divided upon the common stock."

Upon the filing of this bill of complaint, with the exhibits, and after hearing counsel, the judge of the Circuit Court granted a preliminary injunction, according to the prayer of the complainant.

The defendant appeared and filed an answer to the bill on 10th February, 1871. Afterwards, on the 28th March, it filed an amended answer, and on this answer and replication thereto the hearing was had.

This amended answer admitted the incorporation of the defendant, the construction of the Hannibal and St. Joseph Railroad, the issuing of stock and the making of the several deeds of mortgage and bonds, which it averred were prior not only to 1st April, 1863, but October 15th, 1862. It averred that being in an embarrassed state, it did, on the 15th October, 1868, issue to the holders of its bonds, a circular (Exhibit A of amended answer) entitled "Hannibal and St. Joseph Railroad Company —plan for extricating it from its present difficulties and improving its securities," whereby the defendant proposed to the several holders of its bonds that the same should be exchanged in part for other bonds and in part for preferred stock; and in and by the said circular the nature of the preferred stock was declared to be such that its holders should have the right to receive all of the net earnings of defendant in any year up to seven dollars on each share of such preferred stock, and should there be of such net earnings in any year more than enough to pay not only seven dollars per share on all the preferred stock of defendant in preference and priority to the unpreferred or common stock, but also seven dollars on each share of the common stock, then the holders of the preferred and unpreferred stock should share such surplus ratably; the words of the said circular in that behalf being: "The preferred stock to be seven per cent, and not cumulative, but to share with the common stock any surplus which may be earned over and above seven per cent on both in any one year." That said circular was sent to each bondholder,

and on the 24th November, 1862, the bondholders had accepted said proposal and signed an agreement annexed to a copy of said circular proposal in the following words: "We, the subscribers, owners of bonds issued by the Hannibal and St. Joseph Railroad Company, * * * hereby respectively agree to surrender the same, and receive in exchange therefor new bonds and preferred stock in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities, dated October 15, 1862, and hereto annexed;" which agreement was made Exhibit B of defendant's amended answer. Thereupon defendant did, on 24th November, 1862, appoint a committee, etc., etc., "with power to carry out the intentions of the circular aforesaid of 15th October, 1862." The duties and powers of that committee were, by the terms of their appointment, defined and limited to be the effectuating of the intentions of said circular and its acceptance by the bondholders; all of which appears by the resolution of said defendant under date of 24th November, 1862, marked Exhibit C of the amended answer. The committee prepared said indenture, dated 1st April, 1863, made Exhibit D of the amended answer. On 24th April, 1863, defendant issued and duly published a call for a stockholders meeting to be held on 30th May, 1863, to consider whether the corporation would authorize the carrying of said agreement into full effect, which agreement was supposed to be that which had been proposed on the 15th October, and accepted on the 24th November, 1862, and to be merely carried out by the said indenture of 1st April, 1863, as will more fully appear by the terms of the call, a copy of which was made Exhibit E. On the 30th May, 1863, a majority of the stockholders ratified said agreement provisionally made as aforesaid on the 24th November, 1862, and did direct the execution of the indenture dated 1st April, 1863, and the issue of bonds and certificates in conformity with said agreement and indenture; and, in making said authorization, said stockholders had regard to the terms of said agreement, provisionally made, as aforesaid, before and on 24th November, 1862, and in order more fully and completely to effectuate said purpose, said stockholders

did direct that the Board of Directors of said corporation should prepare and adopt, in behalf of said corporation, such certificates in relation to the preferred stock, to be issued under said agreement, as might be necessary to carry the proposed scheme into effect, and to cause the same to be executed in behalf of said defendant, in such manner as the Board of Directors should deem best; for proof of all which, reference was made to the report of proceedings at said stockholders meeting, marked Exhibit F; and on 26th June, 1863, the said Board of Directors prepared and adopted a form of certificate of preferred stock, to be issued by said defendant, as will appear by Exhibit G. These forms of certificates were adopted by the defendant, acted on by it in all its dealings with its bondholders subsequent to the 30th May, 1863, and were received by all the holders of said defendant's bonds as a full compliance with and satisfaction of the terms and true meaning of said agreement and indenture: all of the certificates of preferred stock held by complainant are of the form shown by said Exhibit G: all the certificates of preferred stock held by whomsoever, are in the same form: and in and by all of them it is declared and witnessed that the holder thereof is entitled to receive all the net earnings of the defendant that may be divided in any year up to $7 on each share of the preferred stock, and also to share in any surplus beyond seven dollars per share that may be divided on the common or unpreferred stock. Defendant alleged that it had always been ready and willing to reckon and account with complainant as to his preferred stock on the basis aforesaid, conceding that the holders of preferred stock are entitled to receive all of the net earnings of the road in any year up to seven dollars per share of of such preferred stock, before the holders of common or unpreferred stock can receive any part thereof; that should it come to pass that the net earnings in any year should not exceed seven dollars per share of the preferred stock, then the holders of the preferred stock would take all, to the exclusion of the holders of the common or unpreferred stock; that should the net earnings exceed seven dollars per share of the preferred stock, then the holders of the common or unpreferred stock

would receive the same until each share of common or unpreferred stock receives seven dollars, and that if there should be any surplus beyond seven dollars per share on both the preferred and unpreferred stock in any year, then such surplus should be shared ratably by the holders of preferred and unpreferred stock. Defendant maintained that these were the whole of the rights of the holders of preferred stock; that if the language of the indenture be capable of any construction different from that of the circular proposal, dated 15th October, 1862, the acceptance thereof by the bondholders, dated 24th November, 1862, and the certificates of preferred stock, then the language of said indenture was mistakenly used and adopted by the stockholders of defendant, and that the said indenture only reflects, expresses and declares the meaning of said defendant, its stockholders assembled on 30th of May, 1863, its bondholders at that time, and the holders of its preferred stock, so far forth as it carries into effect the terms of said agreement provisionally made before 24th November, 1862, between defendant and its bondholders. Defendant further said that the true intent and meaning of the indenture, and the acquiescence of the bondholders therein, were afterwards shown and acknowledged, and the same was practically interpreted by the parties thereto, by the preparation of the forms of preferred stock certificates on the 26th June, 1863, by said defendant, and the acceptance of these by the complainant and all other holders of preferred stock, as a full and ultimate compliance with and satisfaction of the letter and spirit of the agreement provisionally made as aforesaid between defendant and its bondholders before 24th November, 1862.

The several exhibits are set out at length.

1. The controversy in this case turns upon the construction to be given to the several instruments, of which the first is dated 15th October, 1862, termed a circular, being a proposal on the part of the Hannibal and St. Joseph Railroad Company to the holders of the bonds secured by its first, second and third mortgages, to exchange these bonds for other bonds in part and preferred stock in part. In this proposal the nature of the preferred stock was carefully defined. It was declared that "the

preferred stock" [was] "*to be seven per cent and not cumulative, but to share with the common stock any surplus which may be earned over and above seven per cent UPON BOTH in any one year.*" The circular proceeded at some length to detail the particulars of the proposal, but it is believed unnecessary to quote further from it.

2. The next paper is the agreement of the bondholders to accept the proposed plan. This agreement is annexed to a copy of the circular or plan itself. Its date is not given. No doubt it was acceded to by different bondholders at different times, but all of them must have become parties to it on or after 15th October, and on or before 24th November, 1862. The language of the agreement (p. 26 of printed record) is as follows: "We, the subscribers, owners of bonds issued by the Hannibal and St. Joseph Railroad Company, of the kinds and amounts set opposite our names, respectively, hereby agree to surrender the same and receive in exchange therefor new bonds and preferred stock, in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities, dated 15th October, 1862, and hereunto annexed."

3. The third paper is the resolution of defendant's Board of Directors, under date of 24th of November, 1862. It is in the following words: "Voted, that Messrs. Bartlett, Thayer & Hunnewell be, and they are, hereby appointed a committee with power to carry out the intention of the circular of October 15, 1862, entitled a 'Plan for extricating it from its present difficulties and improving its securities,' and that they are authorized to make such expenditures therefor as to them may seem discreet."

4. Then comes the indenture of 1st April, 1863, which was reported by this committee, the portion of which the complainant relies on is in the words following: "And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of seven per cent from the net earnings of said road in each year, whenever a dividend of said net earnings shall be made, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend

with said other shares in the net earnings of said corporation beyond said seven per cent, but in no case to be entitled to an accumulated dividend (in case a dividend shall fail to be made in any one or more years, or, if made, be insufficient to pay said seven per cent) in any subsequent division of said net earnings, but shall be entitled only in that event to said seven per cent, and to share in said surplus earnings as aforesaid."

5. This indenture being laid before the Board of Directors was by it referred to a stockholders' meeting, held at Hannibal on the 30th May, 1863. At this meeting there were present, in person or by proxy, 128 holders of 14,311 shares of stock. The total number of stockholders of the company was 215. The total number of shares was 17,197. Four persons, representing 54 shares of stock, were personally present. The others were represented by their proxies. It follows that of the whole number of shares present, 14,251 were voted by proxy. Of the four stockholders personally present three were members of the Board of Directors on 1st April, 24th April, 30th May and 26th June, 1863, to wit: J. T. R. Hayward, Joshua Gentry and John L. Lathrop.

6. At this meeting the Board of Directors were "authorized and instructed to procure and adopt, on behalf of the corporation, such certificates in relation to the preferred stock, to be issued under said agreement, as may be necessary to carry the same into effect, and cause the same to be executed in behalf of this corporation in such manner as they may think best, and that they be further authorized to execute any other writings or agreements which may be necessary to carry said agreement into effect."

7. Under this authority the directors, on the 26th June, 1863, prepared and adopted the form of certificate now, and ever since that time, in use; setting out that * * * is entitled to * * * shares of preferred stock, and to receive all the net earnings of the said Company, which may be divided pursuant to said indenture, in each year, up to seven dollars per share, and to share in any surplus beyond seven dollars per share, which may be divided upon the common stock.

8. These certificates have been received by the bondholders, without exception to their tenor, as a fulfillment of the agreement made between them and the corporation in respect of the preferred stock to be issued according to the proposal of the company to its bondholders on the 15th October, 1862, and the acceptance thereof by the bondholders on, or before, 24th November, 1862; and this reciprocal, cotemporaneous and mutual interpretation of the agreement by both the parties to it, binds both and all.

(*a*). Naturally, we first look to the first mention, and the first definition of what is known as the "preferred stock" of the Hannibal & St. Joseph Railroad, in order to determine its nature and qualities. In the fall of 1862, the corporation was embarrassed, and unable to fulfil its engagements to its bondholders. It was a time of distress and complexity, such as no one, three years before its occurrence (or at the date of the third mortgage), could have dreamed of. The holders of its three classes of bonds were by no means in the same situation. A sale of the road at that time, under the first mortgage, would in all likelihood have but resulted in the realizing of a sum barely sufficient to satisfy its bondholders, perhaps would only have paid even this preferred class a percentage of their investment. To precipitate such a sale at such a crisis would have been not only to the other mortgagees oppressive, but immediately injudicious and hurtful to the holders of the first mortgage bonds, and in the spirit of enlightened liberality with which this preferred class met the proposal of the corporation, we see a memorable instance of wisdom, as well as of generous sympathy. Nothing could be more unambiguous than the definition of preferred stock given by the corporation in its circular of October 15, 1862, and in accepting the terms of this proposal, as so many of the bondholders did before 24th November, 1862, there was no possibility of any misunderstanding as to the nature of the thing thus provisionally accepted. It was declared to be preferred stock up to seven per cent, and not cumulative, "but to share with the common stock in any surplus which may be earned over and above seven per cent UPON BOTH in any one year." The surplus

then, divisible ratably among the holders of both orders of stock could only exist when the net earnings in any one year should exceed seven per cent upon the whole of the stock, preferred and unpreferred. If, for the sake of presenting the matter more definitely, we make use of algebraic notation, and call the number of shares of preferred stock, A; the number of shares of common or unpreferred stock, B; the net earnings in any one year, E; and the surplus in any year, S; then so long as E is not greater than 7 A+7 B, there can be no surplus to divide ratably among the holders of preferred and unpreferred stock.

If the net earnings in any year only equal seven dollars on each share of preferred stock, or are less than this sum, the holders of that stock take all. In this case E is at best only equal to 7 A. This condition is expressed by the formula, E=7 A.

If the earnings exceed seven per cent of the preferred stock, the preferred stock has the advantage of the unpreferred, until this excess is equal to seven per cent on the unpreferred stock. When this limit is reached, or when E=7 A+7 B, the two classes of stock are for that year on a footing of equality. The advantage of the preferred stock is, however, too marked to require illustration. Not only has it a priority over the other, and will take *all* up to a certain mark, but it will retain that advantage until another and very distant limit is reached by the earnings of the road. It is obvious that so long as E $<$7 A+7 B, though the condition E$>$ 7 A may obtain, the preferred stock has the clear advantage, an advantage not only in amount, but in certainty; and this advantage always existing, so far as certainty and priority are concerned, does not disappear even in amount, until we reach the condition indicated by the formula E=7 A +7 B.

If the earnings reach a sum exceeding seven per cent upon *both* classes of stock, then, for the first time, we have the surplus spoken of in the circular, and then, for the first time, exists the condition indicated by the formula E=7 A+7 B+S.

(*b*). These propositions are simply the development into detail of the definition given of preferred stock in the circular of

Oct. 15, 1862 (see p. 34 of the MS., and 18 of printed record). It was the proposal contained in this circular that the bondholders accepted on or before 24th November, 1862; and it was for the purpose of *carrying out the intention of this circular* (see p. 52 of MS., 28 of printed record) that the committee of three were appointed to embody and effectuate the "*agreement*" between the bondholders and the corporation. Clearly, the only agreement, the only *aggregatio mentium* which had then been arrived at, was the acceptance by the bondholders of the proposal of the corporation. Equally clear is it that this committee had no power to depart from the terms of that agreement. Of course it was open to both parties to abandon this provisional agreement, and make another, but for this purpose a new "*agreement*" was necessary. If the committee, instead of respecting the agreement already made, proceeded on the basis of something different, it is too plain for argument that it transcended its powers, was wise over much, and justly incurred the censure of being either careless or assuming. While pursuing the terms of its authority, though appointed by only one party, it may fairly be regarded as the organ of *both* the corporation and its bondholders. If it departed from these terms it ceased to represent either; and nothing short of the most explicit subsequent recognition and ratification of such departure by *both* parties can make it binding on either. It will appear presently that it was in fact not recognized or ratified by either party.

(*c.*) The language of the "indenture" prepared by the committee is the foundation of the claim of the complainant, and it is not to be denied that standing alone, not collated and compared with either what precedes or what follows, not *construed* in short according to that canon (*ex antecedentibus et consequentibus optima fit interpretatio*) of interpretation, which, from time immemorial, has been received and respected by the profession, it gives some countenance to *his* theory. Recurring to the notation previously employed, this theory gives to the preferred stock, besides its original and prior dividend of seven per cent, a ratable share of the remainder of the earnings as soon as, and whenever E> 7 A. The condition of the existence of a surplus is

by this theory, E=7 A+S'. (It need hardly be said that in these formulas E, S, and S' are variable; or rather E is variable; when once E is ascertained, A and B being constant, S, and also S' are easily determined in terms of the known quantities.)

It has been said that the language of the indenture alone gives some countenance to the claim of complainant. It is only a slight countenance, however, and the little that it gives can be shown to result from the use of a single word, ordinarily very harmless and insignificant, but of frequent, almost of wearisome occurrence in legal papers; a word more apt than, perhaps, any other to be used carelessly, and, as can be demonstrated with something like absolute rigor, so used in this case.

To make this demonstration, it will be useful to place before our eyes the passage, the interpretation of which is in question. It appears about the middle of page 7, of the printed record, and has already been quoted. For the sake of exhibiting the passage as it actually appears in the indenture, and as defendant thinks it was intended to be written, the two versions are presented in parallel columns.

AS THE PASSAGE NOW STANDS.	AS DEFENDANT THINKS IT WAS INTENDED.
"And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of seven per cent from the net earnings of said road in each year, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares in the net earnings of said corporation, beyond said seven per cent, but shall at no time be entitled to an accumulated dividend, etc., etc."	"And said corporation covenants and agrees that said preferred stock shall be entitled to a dividend of seven per cent from the net earnings of said road in each year, before any dividend shall be declared upon other unpreferred shares of said corporation, and to an equal dividend with said other shares, in the net earnings of said corporation, beyond seven per cent, but shall at no time be entitled to an accumulated dividend, etc., etc."

Now, while it is not intended to deny that the meaning of a sentence is to be collected from every word composing it, and that, if possible, full significance shall be given to every particle, it is submitted that this word "said" is exceedingly apt, even in carefully drawn documents, to be repeated sometimes needlessly,

to the offending of the ear, and sometimes erroneously, to the impairing of the sense. I have nothing more than the inherent probability of the thing to offer when we look at this paper alone, to show how easily such an inadvertence may have varied the expression, to the perversion of the meaning. But when we look at the circumstances under which the committee which drafted this indenture was appointed; the agreement with the bondholders which the committee was instructed to embody and carry out; the action of the directors upon the indenture; the reference of the question of its adoption to a stockholders meeting; the guarded terms of the resolution of adoption; and, finally, the definition, unequivocally given, of the nature of the preferred stock by both the corporation and its bondholders, by the form of the certificate adopted, all doubt vanishes as to the construction which must be placed on *all* the documents, and particularly the last (the stock certificate), which can be pointed to as evidence of the intention of the contracting parties.

Even as the words stand on the indenture, they are at most equivocal: "The said preferred stock shall be entitled to a dividend of seven per cent from the net earnings of said road, in each year, whenever a dividend of said net earnings shall be made, before any dividend upon other unpreferred shares of the said corporation." So far the meaning is plain. It is clear that before any dividend shall be declared upon other unpreferred stock of the company, the preferred stock shall, first of all, have seven dollars per share out of the net earnings. This priority being satisfied, it is provided that the preferred stock is "to have an equal dividend with said other shares in the net earnings of said corporation, *beyond said seven per cent.*" It is manifest that this *said*, last occurring, makes all the difficulty in the way of the defendant, and is the only rock of refuge for the complainant. Take *it* away and his case is at an end; for if the sentence were to read: "to have an equal dividend with said other shares in the net earnings of said corporation, *beyond seven per cent*," the perfect harmony of the indenture with the proposal of October 15, 1862, the agreement of the bondholders entered into before November 24, 1862, the instructions of the

committee then appointed, and the form of the certificate of preferred stock finally adopted, would not be open to serious dispute. But taking the words as they stand, do they imply "beyond *the amount* of seven per cent?" If so, they only constitute a provision for sharing the excess beyond the amount of seven per cent on both classes of stock; and *such* a provision being in conformity with the instructions given both by the corporation and its bondholders to the draftmen of the indenture, the interpretation of the document which effectuates and carries out those instructions must be preferred if it be a possible one; or, do the words employed mean "beyond the seven per cent to which the preferred shares are entitled?" While this is on the face of the paper, a probable, it is not a necessary construction; and it is more than sufficient for the purposes of defendant to show that it is not absolutely unavoidable. For we must constantly bear in mind that we only bring the two contracting parties together *twice*, between the 15th of October, 1862, and the 26th of June, 1863. The first time they thus came together, the agreement of the 24th of November, 1862, was the result. The next produced the form of the certificate of preferred stock, which all the bondholders accepted. Let us go back a little and observe the various steps jointly, and also those separately taken. When the corporation made a proposal, dated October, 1862, which its bondholders accepted before November 24th, 1862, the company appointed an agency to carry the agreement into execution. So far, there was an agreement, and very definite instructions were given to this agency. Did this agency conform to its instructions, or did it not? If it did, then the indenture corresponds, and is in harmony with the agreement of 24th November, 1862, which contains an unequivocal definition of the nature of the preferred stock of the corporation, and this definition is fatal to the pretensions of the complainant. Moreover, if these agents did really do the work which was set them to do, both parties, the corporation and the bondholders, are bound by what they did. But, as we have seen, in this case the complainant is out of court. If they *did not* follow these instructions, and carry out the agreement of the

parties, then their work was something different from what either party contemplated; was either more or less advantageous to one party or the other, than the agreement already made. It makes no earthly difference which of these it was. The moment the committee, instead of doing what they were authorized to do, did *something else* (as is the hypothesis, for the sake of the argument), it was something which bound neither party, without intelligent recognition and ratification by both; unless it can be maintained that one party can, in the absence, and without the consent of the other, make an agreement, or abrogate or vary one already made.

Let us next examine whether anything was done, and what, towards such recognition or ratification by either party.

We see that the acceptance or rejection of the terms made by the indenture was referred to a stockholders meeting, which convened on the 30th May, 1863; and that the stockholders on that day did two things: one of which was to frame the certificate of the preferred stock (which contained a definition of its nature, and of the privileges of its holders) to be issued under the indenture. In other words they put an interpretation upon the indenture, and declared its meaning. Having done this, they proceeded to authorize the execution of the instrument thus interpreted.

To these two documents the bondholders were, up to this time, no party, except upon the hypothesis that no change has been made all this time in the agreement made by those of the stockholders, who signified their acceptance before November, 1862, of the terms proposed by the circular of 15th October, 1862. How then could the bondholders become bound by these documents? Clearly, only by becoming parties to them, and adopting them. But these documents are not tendered to the bondholders singly, but both together. They must accept both as part of a connected whole, or reject both. If minded to accept the indenture alone without the stock certificate, which defines its meaning, they are met by the difficulty that in so doing they will embrace a barren and unpractical entity. It will be to no purpose that they insist on the possible, or even the probable mean-

ing of the indenture standing by itself. No matter what speculative views they may entertain of its tenor, there is nothing vital in them until they have the right to call its meaning in question. This they can only do by becoming holders of stock, and the moment they become possessed of a stock certificate, they are met by the inexorable interpretation which that certificate puts upon the indenture. As stockholders, they can only have what their certificate calls for. It is not pretended that this certificate is erroneous in its form; that any mistake influenced its terms, or that the stockholders have a right to the aid of a court of equity to reform it. Clearly, the scope of the bill in this case is entirely unsuited to any such design.

Both these documents were accepted by the bondholders. We have seen the terms of the indenture, and must now examine those of the stock certificate, for clearly upon this inquiry are suspended the issues of this controversy. If it gives support to the apparent meaning of the indenture, then though that instrument does violence to, and is a wide departure from, the terms of the proposal made by the company, and accepted by its bondholders in 1862, yet, as both parties were competent to make, in 1863, a new and different contract, their work cannot be challenged on this account. If, on the other hand, it puts on the indenture an interpretation which is consistent only with the circular of 1862, this interpretation, being accepted by all who take the certificates of preferred stock, effectually closes the discussion by a decision in favor of the defendant.

Coming to the examination of this certificate, we see that the privileges of the holder of preferred stock are two in number. The first, which is perfectly unequivocal, is the right "to receive all the net earnings of said company, which may be divided, pursuant to said indenture in each year, up to seven dollars per share."

Thus far there is no dispute. The company admits that this is the measure of the preference. If the net earnings do not exceed seven dollars per share of the preferred stock, the holders of that stock take them all, and the holders of the unpreferred stock take nothing.

The next privilege is the right "to share in any surplus beyond seven dollars per share, which may be divided upon the common stock." That is, the divisible surplus, that in which the holders of preferred and unpreferred stock will "share" ratably, is what will remain of the net earnings after taking from them both 7 A and 7 B.

According to the theory of the plaintiff, the preferred stock takes a ratable share of the net earnings, besides its seven dollars per share, already provided, as soon as E > 7 A. By this theory, the condition of a surplus is E=7 A+S; while by ours the condition is E=7 (A+B)+S. But the terms of the certificate leave no doubt as to which of these theories is correct; for the surplus of which that paper speaks is a surplus beyond seven dollars per share, which may be divided upon the *common* stock, and it has already provided for seven dollars per share, which, first of all, must be set apart for the preferred stock. *Both* of these percentages are spoken of as being first satisfied before the surplus in which both sets of stockholders are to "share," is ascertained. In the most precise and unambiguous terms, this surplus is spoken of as some thing "beyond seven dollars per share, which may be divided upon the common stock," that is, something existing when, *at least*, 7 B has been taken from E. But it is not conceivable that only 7 B is to be deducted from E, before we reach the surplus, for if so, what will the preferred stock have? If it is to have *nothing*, what becomes of the preference so plainly provided for it? Nothing can be clearer than that the first deduction from the net earnings is this preferred dividend, which, in our notation, is 7 A; and, as the surplus in which both sets of stockholders are to share only exists after 7 per cent of the common stock has been deducted from the earnings (which is 7 B, in the notation employed), the conclusion that this surplus can have no existence until E=7 A+7 B+S, or 7 (A+B)+S is, it is submitted, irresistible.

It would savor of mockery if the company should say to the holders of preferred stock, "You claim to share in a surplus defined by your certificate. We look to the mention of surplus in that paper and find it to be something that remains of the net

earnings, after seven dollars per share have been divided upon the common stock. We find no such pointed injunction to deduct from these earnings seven dollars per share on the preferred stock; therefore, if you prefer it, only seven dollars per share on the common stock shall be deducted from the net earnings, and in the surplus after this deduction you, and the unpreferred stockholders, shall share ratably." And yet, the preferred stockholders in such case would be simply met with reasoning of which they themselves had furnished the example. There is precisely the same pseudo-plausibility for the offer just supposed that exists in favor of the case of the complainant, and not one whit more. Neither can stand the test of scrutiny. The complainant contends that the surplus which he is desirous of sharing exists as soon as his claim is paid out of the net earnings; that is as soon as $E > 7\ A$. But we see plainly, from the certificate itself, that this surplus is understood as existing only when at least 7 B has been taken from E; and that, in this surplus, whenever it is ascertained, the common stock is to share with the preferred; so that, at any rate, the condition must obtain that $E > 7\ B$. How much greater we may not, imitating the example set us, choose to inquire; and we may prefer arresting the inquiry here, and saying that the surplus is indicated by the formula $E = 7\ B + S$. This, to be sure, annihilates the advantages of the preferred stock, and is at war with the proposal of October 1862, and its acceptance on or before November 24, 1862; and the undersigned begs to be understood as distinctly disavowing any belief in the conclusion announced. But seeing that this surplus can only exist when seven dollars per share have been divided on the common stock (the language of the stock certificate being "to share in any surplus beyond seven dollars per share, which may be divided on the common stock"), the complainant has no right to object when he is told to take his choice between a surplus existing when *only* this percentage has been taken from the net earnings, and a surplus existing when first of all seven dollars per share has been given to the preferred stock, and then seven dollars per share has been divided on the unpreferred stock; that is, between a surplus indicated by the

equation E=7 B+S, and one by the equation E=7 (A+B)+S. As has been already admitted, the first of these modes of ascertaining the surplus does violence to the circular, and its acceptance in 1862, and, also, to the terms of the certificate of preferred stock. It altogether destroys, indeed, the preference due to this stock, and subordinates it to the common stock. But the second of them is in entire harmony with the circular, its acceptance, and the terms of the preferred stock certificate; and, by the same token, it is fatal to the pretensions of the complainant.

As has been said, the contracting parties conducting this negotiation, by correspondence as it were, have been a little at cross purposes. When the proposal of 15th October, 1862, was accepted before the close of the following month, it seemed only necessary to execute the agreement thus reached. That the company sought to do this can scarcely be doubted, for the instructions given to the committee are unmistakable. What the committee did in pursuance of these instructions, was either something warranted by them or not warranted. If warranted by the instructions, then the indenture was an effectuation of the contract of October—November, 1862—and plaintiff's case is at an end. If not warranted by those instructions, then the work of the committee is binding on neither party by virtue of anything already done or agreed to, and can only become binding by subsequent ratification and adoption by both contracting parties. No such ratification appears until an interpretation is put upon the work thus done. It is declared to have a certain meaning and significance, and thus interpreted it is accepted by one of the parties (the railroad Company), and tendered for acceptance to the other (the bondholders). By them also it is accepted, with the interpretation attached; and then, but not before, it becomes reciprocally binding.

On the 30th May, 1863, the very meeting which professed to adopt the indenture conferred upon the directory the right of determining its meaning in practical dealing with the bondholders. The persons present at the two meetings (the stockholders and the directors) were almost identically the same.

The agreement between the bondholders and the company had already been made. The general authority of the directors to make all proper contracts in behalf of the company cannot be doubted. Independent of the vote of the stockholders on 30th May, 1863, the directors had power to modify this or any other inchoate contract, before the rights of third persons attached. But with the vote of the stockholders, there was a concurrence of all the power which can reside, either in the Board of Directors or the stockholders, or both, and this power is exercised on the 26th June, 1863, before the bondholders are consulted at all. What was then said to the bondholders amounted to this: The Company says to them, "here are the papers, the indenture and the certificates of preferred stock, for which it makes provision. These are our understanding of the agreement made in November last. Examine them, and if *you* also consider them a fulfillment of that agreement, accept them, and the matter is closed." The bondholders do examine them, do approve and accept them. It is submitted that the whole matter is thereupon closed, and that nothing remains to be said.

Respectfully submitted.

THOS. T. GANTT,

of Counsel for the Hannibal and St. Joseph Railroad Co.

For the decisions of the Circuit
Courts see Dillon. p. 174

P.S.—

If it could be held that the legal construction of the certificate of stock on which plaintiff's claim rests, either standing alone or with the aid of the external facts, is adverse to the defendant, then we say that upon the proofs in the cause plaintiff cannot maintain this bill.

The answer (record, page 25) contains the following averment: "If the language of the said indenture be capable of any construction different from that of the circular dated 15th October, 1862, the said agreement made by the bondholders on or before November 24th 1862, and the said certificates of preferred stock, then the language of the said indenture was mistakenly used and adopted by the stockholders of the said defendant, and that the said indenture only reflects, expresses and declares the meaning of the said defendant, its stockholders assembled on the 30th of May, 1863, its bondholders at that time and the holders of its preferred stock so far forth as it carries into effect the terms of the said agreement provisionally made before the 24th November, 1862, between the defendant and its bondholders."

Now this is a bill seeking the interposition of the court to effect the specific performance of the contract alleged by plaintiff to be contained in and created by his certificate. Its prayer is (record, page 5) "that said defendants be further enjoined and restrained from hereafter making or paying out any dividend upon the common or unpreferred stock of said defendants unless and without they, the said defendants, after having first made said seven per cent dividend upon said preferred stock, shall, at the same time of declaring a dividend upon the common or unpreferred stock, declare an equal dividend upon the preferred stock. And further, that upon a final hearing of this cause, *said injunction heretofore prayed for be made perpetual.*"

Specific performance is effected in equity by a perpetual injunction against doing any other thing in the premises than to carry out the contract. In this case no affirmative act or performance could be invoked until a dividend was earned and ready for distribution. (Rolfe vs. Rolfe, 15 Sim. 88; Lumley vs. Wagner, 1 De G. M. & G. 604.)

There is no better established doctrine than this, that where a court of equity is called upon to exercise powers of this description it uses its discretion in view of the whole case; and "if the defendant can show any circumstances *dehors* independent of the writing, making it inequitable to interpose, the court, having satisfactory information upon that subject, will not interfere." And further, that for this purpose, oral evidence, outside of the contract, is clearly admissible.

Clowes vs. Higginson, 1 V. & B. 524.
Garrard vs. Grinley, 2 Swanston, 241.

The facts of this cause, to which the above doctrine is applicable as showing by extraneous proofs derived from written documents, the real intent of the parties have already been stated. To these must be added the concurrent testimony of all the directors who took part in the arrangement, which will be found in the record, pages 45 to 56, and they establish conclusively and without contradiction that to grant to the plaintiff the relief he seeks would be grossly inequitable.

T. T. GANTT.

In the Supreme Court of the United States.

JOHN BAILEY,

APPELLANT,

vs.

THE HANNIBAL & ST. JOSEPH RAILROAD CO.

APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF MISSOURI.—IN CHANCERY.

Statement and Brief by James Carr, Counsel for Appellee.

WASHINGTON:
H. POLKINHORN & CO., PRINTERS,
1873.

Supreme Court of United States.

DECEMBER TERM, A. D. 1872.

JOHN BAILEY, *Appellant*, v. THE HANNIBAL AND ST JOSEPH RAILROAD COMPANY, *Appellee.*	Appeal from the Circuit Court of the United States for the Districts of Missouri.

STATEMENT OF THE CASE.

On the 17th day of November, A. D. 1870, the appellant filed his bill in equity against the appellee, in which he alleged, that the appellee is a corporation duly chartered by and under an act of the Legislature of the State of Missouri, approved February 16, 1847, and other acts amendatory thereof. That prior to April 1st, 1863, the appellee issued and delivered certificates of common stock, divided into shares of $100 each, and amounting in the aggregate at par, to about $3,000.00., that the appellee constructed the railroad situated in the State of Missouri, authorized by its charter, became possessed of the lands, franchises, rolling stock, and other property mentioned in Exhibit A, annexed to the appellant's bill, subject to the liens of the State of Missouri, and of the three several mortgages described in said exhibit.

Exhibit A recites that on the 1st day of April, A. D. 1856, the appellee issued its bonds of that date to the amount of $5,000,000, payable on the 18th day of April,

A. D. 1881, with the interest semi-annual, at the rate of seven per cent, and secured the payment of said bonds and interest by a mortgage upon its lands. That the appellee, on the 1st day of July, A. D. 1858, issued its bonds of that date to the amount of $1,500,000, payable on the first day of July, A. D. 1883, with interest semi-annual, at the rate of seven per cent. per annum, and secured the payment of said bonds and interest, by a mortgage of its road, franchise, rolling stock, and other property, subject to a lien thereon to the State of Missouri, for $3,000,000. That the appellee, on the 15th day of November, A. D. 1859, issued its bonds of that date to the amount of $1,500,000, payable on the 15th day of Nov., A. D. 1889, with interest semi-annual, at the rate of seven per cent. and secured the payment of said bonds and interest, by a mortgage of the same date of its said road, franchises, rolling stock, and other property.

That said bonds were on said first day of April, A. D. 1863, held by various persons and corporations. That the appellee was, on said 15th day of April, A. D. 1863, unable to pay, and did not pay, the interest due on said bonds, and was unable to pay, and did not pay, any dividends upon said stock, and that said stock was at said time without any pecuniary value. That said road, lands, rolling stock and other property of the appellee were at said time liable to be sold under foreclosures of said mortgages, or some of them, and the proceeds applied in payment of said bonds, and said unpreferred stock left wholly worthless.

That on the 1st day of April, A. D., 1863, the appellee executed and delivered to Wm. H. Swift, Sidney Bartlett and Nathaniel Thayer, as trustees, the indenture hereinbefore mentioned, marked Exhibit A. That the terms of said indenture were accepted by the holders of

said bonds, and that certificates of preferred stock were issued to, and taken by, the holders of said bonds. A copy of said certificates is annexed to said bill, marked Exhibit B. That by the surrender of said bonds issued on the 18th day of April, A. D., 1856, and the acceptance of said bonds and preferred stock issued on the 18th day of April, 1863, the holders of the former surrendered and lost the security by mortgage of thirty per cent. of their bonds and of six months, interest thereon, accruing between April 1st, A. D., 1863, and April 1st, A D., 1864; the holders of said bonds issued July 1st, A. D., 1858, lost and surrendered the security by mortgage of forty per cent. of said bonds and six months' interest thereon, accruing between July 1st, A. D., 1863, and July 1st, A. D., 1864; and the holders of said bonds issued November 15th, A. D., 1859, surrendered and lost the security by mortgage of all said bonds.

That the appellant, by and under said indenture as the owner of eight hundred shares of said preferred stock, is entitled to have and receive from the net earnings of said road in each year, whenever a dividend of said earnings shall be made, before any dividend shall be made to or upon said unpreferred stock, a dividend of seven per cent. per share; and also in addition thereto, and beyond said seven per cent., a further dividend, together with said common stock, and of any surplus of said net earnings which shall be equal to the dividend declared and paid to the said unpreferred stock; or in other words, of a dividend of seven per cent. per share, if said net earnings are sufficient therefor, and if more than sufficient, then to share in any surplus beyond said seven per cent. equally with, and to receive the same dividend as divided upon, the common stock. That an act of the General Assembly of the State of Missouri entitled "an act authorizing the Hannibal and St. Joseph

Railroad Company to convert its bonds into preferred stock," approved January 21st, 1864, empowers the appellee to carry out the provisions of said indenture and authorizes the issue of the preferred stock to said bond holders in conformity with the terms thereof.

That on the 29th day of June, A. D. 1870, the appellee declared and subsequently paid a dividend out of the net earnings of said road of seven per cent. per share to and upon the preferred stock, which dividend the appellant has received upon said eight hundred shares; that at the time of said declaration, the appellee had on hand net earnings of said road, not only sufficient to pay said seven per cent. upon all of said perferred stock, but also sufficient to make a further dividend upon said preferred and common stock, that the appellee, instead of declaring a dividend of said surplus net earnings equally, as required by said indenture, Exhibit A, and said certificate, between said perferred and said common stock, declared a dividend of three-and-one-half per cent. therefrom to and upon said common stock, payable August the 15th A. D. 1870; and at the time of declaring said dividend the appellee further voted and declared that the earnings of said road, from July the 1st, A. D. 1870, to January the 1st, A. D. 1871, be first applied to pay a further dividend of three-and-a-half per cent. on said common stock. That said declaration of dividend to and upon said common stock, and the exclusion of said preferred stock from an equal share therein, and said appropriation of said surplus net earnings to and upon said common stock, are, and each of them is, a violation of said agreement in Exhibit A and the terms of said certificates held by the Appellant. That by and under said agreement and the terms of said certificates, he was entitled to have and receive out of said net earnings, on hand, June 29th, A. D. 1870, as a dividend upon

his said preferred shares, beyond said seven per cent. a further dividend which should be equal to any dividend made upon said common stock; or, in other words, that, in addition to said seven per cent. he was entitled to receive, under said agreement, Exhibit A, and said terms of said certificates, Exhibit B, the same dividend as that declared to and upon said common stock. The prayer of the bill is, that a preliminary writ of injunction may issue, enjoining and restraining the appellee from making or paying out any other or further dividend upon said common stock or any part thereof until it shall have first made a dividend of three-and-one-half per cent. upon said preferred stock of the appellant, being a dividend equal to that made on the 29th of June, A. D. 1870, to and upon the common stock, and payable August the 15th, A. D. 1870; and the appellee be further enjoined and restrained from hereafter making or paying out any dividend upon the common stock of the appellee, unless the appellee, after having first made said seven per cent. dividend upon said preferred stock, shall at the same time of declaring a dividend upon said preferred stock, declare an equal dividend upon the preferred stock; and further, that, upon a final hearing of this cause, said injunction hertofore prayed for be made perpetual. A preliminary injunction was granted on the 17th day of November, A. D. 1870, as prayed for.

On the 28th day of March, A. D., 1871, the appellee filed an amended answer to appellant's bill, in which it admitted all the allegations in said bill, except those wherein the appellant claims and sets up the right, after having received a dividend of seven per cent. on his preferred stock, to share in any surplus beyond said seven per cent. equally with, and to receive the same dividend as divided upon, the common stock. This right the appellee denied. The issue thus made is the real issue in

this case; and in determining this issue the court will have to ascertain the proper construction to be given to Exhibits A, B and C, annexed to the appellant's bill.

With the view of elucidating and sustaining the construction given to the contract between the preferred stockholders and the appellee, the appellee further alleged in said answer, that, finding itself in an embarassed condition on the 15th day of October, A. D., 1862, it issued to all the holders of its bonds a circular, a copy whereof was filed with said answer, marked Exhibit A entitled "Hannibal and St. Joseph Railroad Company, plan for extricating it from its present difficulties and improving its securities," whereby this appellee proposed to the several holders of its bonds, issued and secured as alleged in said bill, that the same should be exchanged for other bonds in part, and in part for preferred stock; and in and by the terms of said circular, the nature of said preferred stock was defined and declared, that its holders should have the right to receive all the net earnings of the appellee in any year up to seven dollars on each share of such preferred stock, and that if there should be net earnings in any year sufficient to pay not only seven dollars per share on all preferred stock of this appellee in preference and priority to the common stock, but also seven dollars on each share of the common stock, and a surplus over and above seven per cent. on both preferred and common stock, then that the holders of the preferred and common stock should have such surplus ratably; the words of said circular in that behalf being, "the preferred stock to be seven per cent. and not cumulative, *but to share with the common stock any surplus which may be earned over and above seven per cent. on both in any one year*;" and said circular was sent to each holder of the bonds of this appellee, and on the 24th of November, A. D., 1862, or before that time, the said several

holders of said bonds had accepted the terms thereof and signed an agreement, annexed to a copy of said circular, in the words and figures following: "We, the subscribers, owners of bonds issued by the Hannibal and St. Joseph Railroad Company of the kinds and amounts set against our names, respectively, hereby agree to surrender the same and receive in exchange therefor new bonds and preferred stock, in accordance with the provisions of the plan for extricating the company from its present difficulties and improving its securities," dated October 15th, 1862, and hereto annexed," marked Exhibit B. of said answer.

Thereupon this appellee, on the 24th day of November, A. D. 1862, appointed a committee, composed of Messrs. Hunnewell, Bartlett and Thayer, "with power to carry out the intentions of the circular aforesaid of 15th October, 1862," and the duties and powers of said committee were by the terms of their said appointment limited and defined to be, to effectuate the intentions of said circular and the said acceptance of the terms thereof. Said committee accepted said appointment, and in the month of April, A. D. 1863, prepared and reported to this appellee the indenture annexed to the appellant's bill, and marked Exhibit A. On the 24th of April, A. D. 1863, this appellee called a meeting of its stockholders to be held on the 30th May, A. D. 1863, at Hannibal, Missouri, for the purpose of considering whether the corporation would authorize the carrying into effect the agreement provisionally made on and before the 24th of November, A. D. 1862, which agreement was supposed and understood by this appellee to be substantially carried into effect by the draft of said indenture annexed to the appellant's bill, and marked Exhibit A, and at the time and place named in said call, a large majority of the stockholders of this appellee voted for the ratifica-

tion of said agreement provisionally made as aforesaid; and authorized the execution of said indenture by this appellee's officers, and the issue of bonds and certificates of preferred stock, in conformity with said agreement and indenture, and each and every one of said stockholders, then and their supposed and believed that the said indenture merely effected and carried out, by appropriate means, the terms of said provisional agreement; and in order more completely to effectuate said purpose, at the same time and place said stockholders did order and direct that the board of directors of said corporation should prepare and adopt, in behalf of said corporation, such certificates in relation to the preferred stock to be issued under said agreement, as might be necessary to carry the proposed scheme into effect, and to cause the same to be executed in behalf of said corporation, in such manner as the said board of directors might think best.

The minutes of said stockholders' meeting are annexed to said answer and marked Exhibit F. On the 26th June, A. D. 1863, the said board of directors, in pursuance of the authority vested in them by said stockholders, proposed and adopted, in behalf of said corporation, the form of a certificate marked Exhibit G, and annexed to said answer, which was used until the passage of the act by the General Assembly of the State of Missouri, entitled "An act authorizing the Hannibal and St. Joseph Railroad Company to convert its bonds into preferred stock," approved January, 21, 1864.

After the passage of said act, said certificates were called in, and in lieu thereof, certificates were issued in the form of Exhibit B, annexed to the appellant's bill; and in said certificate, it is declared, that the holder is entitled "to receive all the net earnings of said com-

pany, which may be divided pursuant to said indenture, in each year, up to $7 per share, *and to share in any surplus beyond* $7 *per share, which may be divided upon the common stock.*"

The only difference between this certificate and the provisional certificate is, that the latter has an *agreement* in it, in these words, viz: "after the requisite authority shall be obtained to issue the same." The rights of the preferred stockholders are precisely the same in each, and are secured *ipsissimis verbis.* Both of said forms were regularly prepared and adopted by the board of directors of this appellee, and were acted on by it in all its dealings with its bondholders, subsequent to the 30th day of May, A. D. 1863, and were received by all the holders of said preferred stock of this appellee as a full compliance with, and satisfaction of, the terms and true meaning of said agreement and indenture; and all the certificates of preferred stock of this appellee held by the complainant and all other persons are of the same form as exhibit B, annexed to the appellant's bill.

It is alleged in said answer, that this appellee has always been ready and willing to reckon and account with the appellant as to his preferred stock, upon the basis aforesaid, conceding that the holders of said preferred stock are entitled to receive of the net earnings of this appellee in any year in preference to, and priority over, the holders of the common stock of this appellee, the whole whereof up to seven dollars per share of such preferred stock, before the holders of such common stock can receive any part of such net earnings; that if the net earnings of this appellee in any year should not be more than seven dollars for each share of such preferred stock, then the holders of such preferred stock will be entitled to the whole thereof, to the exclusion of

the holders of the common stock; that in case the net earnings of this appellee in any year should exceed seven dollars for each share of the said preferred stock, the holders of the common stock are entitled to receive the excess, or so much thereof as will amount to seven dollars on each share of such common stock; and if there be any surplus beyond seven dollars per share on both the preferred and common stock any year, that such surplus shall be shared on both the preferred and common stock of this appellee. And this appellee saith that the appellant is not entitled to any other or further privileges, rights or advantages, in respect to his preferred stock, than are in said answer shown.

It is further alleged, in said answer, that if the language of said indenture be capable of any construction different from that of said circular, dated October 15th, A. D. 1862, the said agreement made by said bondholders, on or before the 24th of November, A. D. 1862, and the said certificates of preferred stock, then the language of said indenture was mistakenly used and adopted by the stockholders of this appellee, and that the said indenture only reflects, expresses and declares the meaning of the said appellee, its stockholders assembled on the 30th of May, A. D. 1863, its bondholders at that time, and the holders of its preferred stock, so far, forth, as it carries into effect the terms of the said agreement, provisionally made before November 24th, A. D. 1862, between this appellee and its bondholders.

The appellant filed a replication to said answer, putting in issue the several matters, averments and things in denial or avoidance of the appellant's bill.

On the trial of the cause the appellant read in evidence Exhibits A, B and C, annexed to his bill; the

depositions of E. T. Hornblower and Nathaniel Thayer; and Exhibit B, annexed to this appellee's answer; Exhibit A 4, annexed to Hornblower's deposition (pp. 36-7 of the transcript,) which is a copy of the vote declaring the dividend in controversy; and Exhibit B, C, F, W, annexed to Thayer's deposition (p. 43 id,) which is in regard to the earnings of the appellee for the six months ending June 30th, 1870. There is nothing in the testimony of Hornblower and Thayer, which changes or modifies said Exhibits.

The appellee read in evidence on the trial the depositions of John L. Lathrop, Nathaniel Thayer, John W. Brooks, H. H. Hunnewell, William Boote, Sidney Bartlett, H. P. Kidder and the supplemental deposition of John W. Brooks; Exhibit B, annexed to Thayer's deposition (p. 55, Id.,) which is a copy of the proceedings of the board of directors when they adopted the *plan* to be submitted to the bondholders for their assent, and the plan itself; Exhibit B, annexed to this appellee's answer (p. 26, Id.,) which is the agreement of the bondhold- to accept said *plan;* Exhibit C, annexed to said answer (p. 28, Id.,) which is a copy of the resolution appointing Messers Bartlett, Thayer and Hunnewell, a committee with power to carry out the *intention* of said *plan;* Exhibit E, (ibid) which is a call for a stockholders meeting to be held at Hannibal, Mo., on the 30th day of May, A. D., 1863, Exhibit F, (p. 29 Id.,) which is the proceedings of said stockholders meeting at which 14,-311 shares voted for the adoption of said plan, (there be-in 17,197 shares in all,) and none voted against its adoption; Exhibit H, annexed to said adoption which is the resolution of said board of directors on the 26th of June, A. D., 1863, adopting the form of certificate to be issued, as in said Exhibit B; and Exhibit I, annexed to

said deposition and is the same as Exhibit C, annexed to said answer (p. 20, Id.) The stockholders who called the meeting to be held on the 30th day of May, A. D., 1863, (pp. 28-9, Id.,) the stockholders who voted at said meeting to adopt said *agreement* (pp. 44-5, Id.,) and the bondholders who accepted said *agreement* "in accordance with the provisions and the plan for extricating the company from its present difficulties and improving its securities, dated October 15th, 1862," (pp. 26-7, Id.,) with the exception of a few holders of a small amount of stock, were the *same* persons.

John W. Brooks was a director and chairman of the board of directors of the appellee prior to and from the 15th of October, A. D., 1862, up to the year 1870. He says in his deposition: "I drew the *plan* for extricating the company from its present difficulties and for improving its securities." "I presented the *plan* at a meeting of the directors of the company, held October 15th, 1862, and voted for it when it was adopted." "The indenture was drawn by Mr. Bartlett. The object of it was entirely to carry out the *plan* and circular. I understood the indenture to carry out the plan." "After I had drawn the *plan*, I drew the *agreement* to be signed by the bondnolders." "I drew the last part of the preferred certificate and obligation attached to the paper marked H, annexed to said deposition of Thayer, from the words of "The Hannibal and St. Joseph Railroad Company hereby certifies" to the end of the paper. In drafting that I understood that I was carrying out the *plan* and circular. I had never heard of but two kinds of preferred stock, one in which the preference was to be cumulative, and the other not to be cumulative. The adoption of the non-cumulative plan was the intention." "I never heard any suggestion, until about the time of

the institution of this suit, that the form of certificates used was not in conformity with the *plan* and circular and bondholders *agreement.*" (p. 49, Id.) In his supplemental deposition (p. 54, Id.,) he defines what he means by "cumulative" and "not cumulative", as follows:

"In my former deposition in this case I use the words "cumulative" and "not cumulative" in referring to such preferred stocks as I had heard of before. In this connection the word cumulative was intended to apply to such preference as if not paid in any one or more years, would be held as a liability to such preferred stock; as, for instance, in the case of a seven-per-cent. cumulative preference stock, if no dividends whatever had been made for five years, there would have accumulated a liability to pay such cumulative preference-stock, five times seven (or thirty-five) per cent. before the common stock would come in for a share of the earnings; while non cumulative in this connection was intended to mean that the rights of the preferred-stock to dividends for any one year is to depend solely on the dividends made in that year. The fact of a dividend being not made in any one year, giving to such not-cumulative preferred stock no rights whatever, by reason of its not being made to any increased preference-dividends in any future year."

Mr. Bartlet in his deposition (p. 52, Id.,) says: "I drew said indenture with the purpose and understanding that the same should and did, carry into effect the provisions of said *plan*, as to the terms and manner of the issue of preferred stock, the rights attached to said stock and to the common stock, as well as all other the provisions of said *plan*, without any intentional change or departure therefrom." The other directors viz: Messrs. Thayer, Hunnewell, Boote and Kidder, all had this same purpose and understanding of the *plan*, the bond-

holder's *agreement* accepting said *plan*, the indenture drawn to carry said agreement into effect, the obligation to issue preferred stock and the certificate of preferred stock. There is not a solitary witness who had any other or different view and understanding of said *agreement*.

The court dissolved the injunction and dismissed the appellant's bill; and thereupon he appealed to this Court.

BRIEF.

The only question presented by this record is, whether the appellant, after having received his seven per cent. dividend per share on his preferred stock out of the net earnings of the appellee, is entitled "to an equal dividend with the common stock in the net earnings beyond said seven per cent; or *e converso*, whether he is only entitled "to share in any surplus beyond seven dollars per share, which may be divided upon both in any year?"

This question will be considered in a two-fold aspect—*First*, with reference to the true construction of the contract beween the appellant and the appelllee, as ascertained from the language of the papers which contain the evidence of it; and *Second*, with reference to the *extrinsic* evidence explanatory of the documentory evidence.

I. The capital stock of a railroad company is divided in-shares, which vest in the stockholders accoring to their contributions, and they entitle the holders of the stock to a corresponding proportionate part out of the profits of the company. "A share in one of these companies may be defined to be a right to partake, according to the amount of the parties subscription, of the surplus profits ob-

tained from the use and disposal of the capital stock of the company, to those purposes to which the company is constituted." (§ 557, A. & A. on Corporations.) This is the definition of common or ordinary stock. But the stock in controversy is what is denominated *preferred* stock. Now what is meant by the words preferred stock as used in the certificate, and also in the act of the General Assembly of Missouri, authorizing the appellee to issue it? Judge Redfield, in speaking of the different expedients resorted to by railway companies to raise money, speaks of issuing preferred stock as one of them, and says, thatit "amounts to much the same thing as a *mortgage* under a different name." (2 Redf. Railways, p. 499.) A mort-gage is a security for a debt, and preferred stock is likewise a security for a debt. The parties to whom the original preferred stock was issued, were all creditors of the appellee, and by changing their debts from bond and mortgage into the *form* of preferred stock, they did not lose their charicteristics of *creditors* in this; that instead of standing on a footing of absolute equality with the common stockholders in the division of the "net earnings," (which is only another name for profits,) they are entitled "to receive *all* the net earnings of said company which may be divided, * * * * in each year up to $7 per share." This right to "all the net earnings" "up to $7 per share," is preference, priority, and metaphorphoses, the holder of this valuable right, from a stockholder pure and simple, into a qualified *creditor* at least, possessing at the same time the ordinary rights of a stockholder. Preferred signifies borne or carried in advance—from *prae* before, and *fero* to bear or carry. Preference signifies precedence, priority, (Worcester,) and frequently in the context in which it is used it has *to*, *above*, *before*, *over*, before the thing postponed. As all men give the preference *to* Horner as an epic poet; the

human body has preference *above* or *before* those of brutes. (Webster.)

Whence was the idea of issuing preferred stock derived? It was from England and goes as far back as 1848. It was not in the Clauses Consolidation Act of 1845, but soon after that date the managers of new railway enterprises which had become straitened and embarrassed for want of money, devised the plan of issuing what they denominated preference shares or stock, in order to raise money with which to complete their half finished roads, to extend their roads, or to build branch roads as feeders to the main line.

"Time is wiser than all the wits in the world" says Lord Coke. Time and experience soon demonstrated that many of these enterprises would for years after their completion not pay even the interest on the money borrowed to build them, and in cases where there were two or more mortgages, the second and third mortgagees lost their debts, if the bondholders under the first mortgage saw proper to foreclose. Thus the second and third mortgagees were practically left to the mercy of the first mortgagees. In this state of affairs the mortgagors of these non-paying enterprises devised the plan of issuing preference shares or stock, instead of issuing bonds and securing them by a second or third mortgage. The advantage of this plan of raising money over the bond and mortgage plan was this, that if the enterprise should not be able to pay the dividends thus secured at the end of the time specified the railway could not be sold out and the stockholders interest in it forever wiped out; but the preferred stockholders were compelled to wait until the railway company had earned enough to pay those stockholders their preferred dividends; which they generally were able to do, after their railways had

been in operation for some time and their business had been increased. Those preference shares were what John W. Brooks denominates "cumulative," *i. e.*, if the railway companies did not earn enough in a year to pay those preferred dividends in that year they had to make up the deficiency whenever they did earn enough, and thus they were practically treated as *creditors* with the superadded right of voting in the election of directors and having a voice in the direction of the affairs of the company with the common stockholders. In many instances the preferred stockholders' dividends absorbed all or nearly all, the surplus earnings of the company, and thus practically rendered the common stock valueless. Hence the 26th and 27th Victoria chap, 118 was passed in 1863, (Bigg Railway Acts, p. 342, sec. 13–15,) which divested the preferred stock of its "cumulative" right, made it "non-cumulative," and placed the preferred and common stockholder more nearly on an equality. Equality is equity, (Henry v. The Great Northern Railway Company, 1 De Gex and Jones, 608; Matthews v. The Great Northern Railway Company, 5 Jurist, N. S., 284; Crawford v. The North Eastern Railway Company, 3 Kay and John, 723; Sturge v. The Eastern Union Railway Company, 7 De Gex, M. and G. 158.

That the preferred stockholders are regarded more in the light of *creditors* than stockholders is shown in the opinion of the court in the case of Crawford v. The North Eastern Railway Company (3 Kay and Johnson, 743,) in which *interest* and *dividends* are said to be synony, mous, (Stevens v. The South Devon Railway Company-12 Eng. L. and Eq., R. 229.

The adjudicated cases in this country in regard to preferred stock are few and shed no light on the proper construction to be given to the contract now under consideration. Hence we have to look to the English de-

cisions on this subject for light, and whilst there is no English decision exactly parallel with this case, still the *principle* underlying the English decisions is applicable to it.

John W. Brooks, who drew the "plan for extricating" the appellee from its difficulties, and improving its securities, was an old and experienced railway manager. He was aware of the Eng lish plan for "extricating" straitened and embarrassed railway companies, and bridging them over the earlier years of their operations. When the bonds in question were issued by the appellee, the country was in a state of profound peace and general prosperity. No human foresight was keen enough to perceive, that in eighteen months from the date of issu- the third mortgage bonds—the country would be convulsed with the terrible throes of a civil war. This war destroyed the business of the appellee, and the rebels tore up its track and destroyed its rolling stock, so that it was not able to pay even the interest on the $3,000,000, of prior State lien, and *a fortiori*, it was not able to pay the interest on its $8,000,000 of other indebtedness. At that time the property, of the appellee, (depreciated as it then was,) would not have sold for enough to have paid the State lien. As the appellee was then in default, the State lien was liable to be enforced by a sale at any time. The bondholders secured by the first mortgage for $5,000,000, might have foreclosed and wiped out all security for the bondholders, secured by the second and third mortgages, and at the same time rendered the stock valueless—they were the owners of nearly all the stock, and were interested in it. To guard against such a catastrophe as this, John W. Brooks' fruitful brain devised the "plan for extricating it from its *present* difficulties, and improving its securities." In the very forcible language of this "plan." "What the property requires

is to have the *accumulation* of it liabilities stopped for a time to enable it to recover from its late disasters, and to have them thenceforward so moderate in amount, that the less sanguine of its proprietors shall feel confident of its ability to meet them." This "plan," was the conception of great wisdom and experience. It sets forth the nature of the preferred stock proposed to be issued in these words, viz: "*The preferred stock to be seven per cent. and not cumulative, but to share with the common stock any surplus which may be earned over and above seven per cent.* UPON BOTH *in any one year.*" This proposal was accepted by the bondholders. Here was the *agreement* of the minds of the respective parties without which the contract could not have been made. This was *the* contract, and henceforwarded the mind must be steadily kept upon this as *the* contract, in order to arrive at the correct construction. The bonds were surrendered and provisional certificates or obligations issued to the bondowners, until the passage of the act of the General Assembly of Missouri, entitled "An act authorizing the Hannibal & St. Joseph Railroad Com. pany to convert its bonds into preferred stock," approved January 21st, 1864. In this provisional certificate the words used are a little different from what they are in the "plan," but they are evidently intended to carry out the plan. The stockholders had ratified the "plan" and nothing else, and the directors had no authority, either under the charter, or from the stockholders to depart from or modifiy the contract contained in the "plan;" and the evidence of all the directors is, that they, in the language of Mr. Bartlett, (who drew the indenture upon which the counsel for the appellant almost entirely base his right to sustain this cause,) had the indenture drawn "with the purpose and uuderstanding, that the same should, and did, carry into effect the provisions of said plan, as to the terms and manner of

the issue of preferred stock, the rights attached to said stock, and to the common stock, as well as all other provisions of said plan, without any *intentional change or departure therefrom.*"

The operative part of the act contemplated by this provisional certificate is in these words, viz : "That the Hannabal and St. Joseph Railroad Company be, and it is hereby, authorized to issue preferred stock to parties now holding its bonds, which may be used in partial or total extinguishment thereof, upon such terms and with such rights as may be agreed upon with such parties, * * * * *provided* that, in declaring dividends, the preferred stock hereby provided for shall have a preference over ordinary stock to the amount of seven per cent. per annum, and no more." This act shows, that the converting of the bonds into preferred stock at not exceeding "seven per cent per annum" was only changing the *form* of the security from bond and mortgage into perferred stock; and that as the bonds only drew seven per cent. per annum, the preferred stock should not exceed that "amount." The construction contended for by the appellant is a palpable violation of this express limitation upon the appellee to issue preferred. Any preference above seven per cent. per annum would not only be a direct violation of the contract between the bondholders and the appellee but would be practically eating up the net earnings from the common stockholders and thereby rendering their stock valueless or almost so, and would also be *ultra vires*, as is plainly shown by said act.

The appellant may with propriety be regarded in a dual character. The one in his charater of *creditor* in which he has a cup of a certain measure to be filled from the fountain of net earnings After his cup has

been filled the appellee's obligation to him in this character is discharged. He then presents himself in his other character as a stockholder. He is told, that as he has already had his measure filled, and that, as nothing but absolute equality prevails among the stockholders, he must await until the other stockholders shall have had their cups of an equal measure filled from the fountain of net earnings, and then, if there is any "surplus" left over and above this measure upon both, he shall share this surplus equally with the other stockholders. Any other construction than this was never heard of until this Wall Street operator got hold of some preferred stock about the time it was understood that the appellee was about to declare a dividend, and then he conceived the idea, that he was entitled not only to a preference of seven per cent. on his stock, but also to come in and share the surplus equally with the common stockholders. He who asks equity must do equity. But there is no equity in thus permitting him to take the lion's share.

This is a suit in equity for the specific performance of the contract between the parties. It is a matter of discretion in the court which withholds or grants relief, according to the circumstances of each particular case, (1 Story's Eq., § 742) There is nothing in this case which reccommends it to the favorable consideration of the court. On the contrary, if the construction sought to be given to this contract by the appellant shall be adopted by the court, it would work the greatest hardship and the grossest injustice upon the common stockholders. This Court does not sit to enforce hard and unconscionable bargains. The appellant's claim in this case very forcibly reminds one of Shylock demanding his pound of flesh.!

II. The *construction* of the contract, set up in the appellant's bill having been denied in the answer, *parol* evidence is admissable to explain the true intent and meaning of the contract. (Coutt's Trustees v. Craig, 2 Henning and Mun, 618; Hagan v. Delaware Ins., Co. 1 Wash. C. C. R., 144; 1 Story Eq., § 134.)

Parol evidence is admissable to connect the *plan* for extricating the appellant, with the *agreement* on the part of the bondholders accepting the terms of the plan, the stockholders meeting, the indenture and the provisional and final certificates of preferred stock, issued in carrying out the plan which contains the terms of the contract, although no reference is made to the plan and agreement in the indenture. (Rutland and Burlington R. R. Co., v. Crocker, 29 Verm., R. 540; Cornell v. Todd, 2 Denio, 130.) *Extrinsic* evidence, may be used to ascertain the true import of a contract of guaranty. (Bell v. Bruen, 1 How., 169; Hagan v. Delaware Ins. Co. *Supra*; Aldridge v. Eshelman, 46 Penn., 420.)

The indenture is not the contract, nor even intended to be the *evidence* of it. It is only *collateral*, and intended to be subsidiary, to the contract. The words in said indenture, upon which the appellant's counsel rely to sustain his claim are these words, viz: "beyond said seven per cent." Now it may be conceded for the sake of the arrangement, that if the plan which was accepted by the bondholders, had had these words in it, too, that the appellant's construction is the correct one. But standing more in the nature of a simple recital referring to the contract itself, upon which alone the indenture was based, and without which the indenture would be meaningless, these words in the indenture will not be allowed to be construed independently of the contract; and *a fortiori*, when so construed, they modify and so materi-

ally change the contract itself, in one of its vital features as to work great injustice and hardship upon the common stockholders. These words were regarded by the court below as having been inserted by *mistake*, and hence were disregarded. (1 Dillon, C. C. R., 174.) The indenture must be read in connection with the *plan* preceding it, and the certificates succeeding it, and thus read and construed in the light shed upon the whole transaction, by the depositions of the principle actors in it, there can be but one constructiongiven to this contract, and that is the construction given to it from its inception to the declaration of the divided in question, and affirmed by the judgment of the court below. (Honor v. Honor, 1 P. Williams, 123; West v. Errissey, 2 Id., 349; Earl of Stamford v. Hobart, 3 Brown, P. C., 33; Jervise v. Duke of Northumland, 1 Jacob & Walker, 549; Bates v. Androscoggin & Kennebeck R. R. Co., 49 Me., 504.)

Viewed in either aspect of this case it is respectfully submitted, that the judgment of the court below is correct and should be affirmed.

JAMES CARR,
of Counsel for the Appellee.